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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, HOUSTON LAWYERS' ASSOCIATION, JESSE OLIVER, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. In cases brought under Section 2 of the Voting Rights Act of 1965 involving judicial elections, is a court of appeals authorized to depart from the analytical framework established by this Court's authoritative construction of the statute in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and applied to the case at bar in *Houston Lawyers' Association v. Attorney General*, 501 U.S. ___, 115 L.Ed. 2d 379 (1991)?

2. Should the Court grant certiorari to resolve a conflict between the ruling below and the decision of the Eleventh Circuit in *Nipper v. Smith*, 1 F.3d 1171 (1993) as to the appropriate tests for determining vote dilution and for measuring minority-candidate electoral success in judicial elections cases?

3. Was the Fifth Circuit's refusal to remand this case to the district court for a hearing on a proposed settlement agreed to by the plaintiffs and the Governor, Lieutenant Governor, Secretary of State, Attorney General, and Legislature of the State of Texas, because of the opposition to the settlement by another state official defendant and by two intervenor-defendants, such a departure from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's power of supervision?

4. Did the Court below fail to execute the mandate of this Court in *Houston Lawyers' Association v. Attorney General* when it refused to remand the case to the district court for an initial determination of whether Texas had a substantial interest in maintaining an at-large system of electing trial court judges?

PARTIES

The participants in the proceedings below were:

League of United Latin American Citizens (LULAC) Local Council 4434, LULAC Local Council 4451, LULAC (Statewide), Christina Moreno, Aquilla Watson, Joan Ervin, Matthew W. Plummer, Sr., Jim Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Judge Mary Ellen Hicks, Rev. James Thomas, *Plaintiffs;*

The Houston Lawyers' Association, Weldon Berry, Alice Bonner, Rev. William Lawson, Bennie McGinty, Deloyd Parker, Francis Williams, *Plaintiff-Intervenors;*

Jesse Oliver, Fred Tinsley and Joan Winn White, *Plaintiff-Intervenors;*

Dan Morales, in his capacity as Attorney General of the State of Texas; John Hannah, in his capacity as Secretary of State of Texas; Thomas R. Phillips, Mike McCormick, Pat McDowell, Thomas J. Stovall, B. B. Schraub, Leslie Murray, Darrell Hester, William E. Moody, Weldon Kirk, Jeff Ealker, Ray D. Anderson, Joe Spurlock II, and Leonard E. Davis, in their capacities as members of the Texas Judicial Districts Board; *Defendants;*

Judge Sharolyn Wood and Judge Harold Entz, *Defendant-Intervenors.*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, League of United Latin American Citizens (LULAC) Local Council 4434, LULAC Local Council 4451, LULAC (Statewide), Christina Moreno, Aquilla Watson, Joan Ervin, Matthew W. Plummer, Sr. Jim Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Judge Mary Ellen Hicks, Rev. James Thomas, The Houston Lawyers' Association (HLA), Weldon Berry, Alice Bonner, Rev. William Lawson, Bennie McGinty, Deloyd Parker, Francis Williams, Jesse Oliver, Fred Tinsley and Joan Winn White, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding August 23, 1993.

OPINIONS BELOW

The opinion of the Fifth Circuit *en banc* is reported at 999 F.2d 831, and is set out at pp. 1a-202a of the Appendix hereto ("App."). The panel decision rendered after the remand of the case from this Court is reported at 986 F.2d 728 and is set out at App. at 203a-486a. The opinion of the United States District Court for the Western District of Texas is not reported and is set out at App. at 487a-549a, except for statistical tables that are an appendix to the district court's opinion. Copies of those tables have been filed under separate cover with the Clerk of the Court.

JURISDICTION

The decision of the Fifth Circuit was entered on August 23, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTE INVOLVED

This case involves Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, which provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by a State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . .
>
> (b) A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in

> the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

This case also involves Section 4 of the Voting Rights Act, as amended, 42 U.S.C. 1973b, which provides in pertinent part:

> (f)(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

STATEMENT OF THE CASE

The Proceedings Below

This is a voting rights case brought by African American and Hispanic citizens and organizations within the state of Texas, challenging under the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, the county-wide election of state district judges in nine metropolitan counties (Harris, Dallas, Bexar, Tarrant, Travis, Lubbock, Midland, Ector and Jefferson) in Texas. Suit was filed on July 11, 1988, in the U. S. District Court for the Western District of Texas against various state officials in their official capacities as surrogates for the real party in interest, the State of Texas.

1. *The District Court's Decision After Trial*

On November 9, 1989, the district court found a violation of the Voting Rights Act in all challenged counties. (App. at 487a-549a). The district court entered findings of fact, favorable to the plaintiffs, for each county on the three threshold factors identified by this Court in *Thornburg v. Gingles*, 478 U. S. 30 (1986):

- the minority group was sufficiently concentrated so as to constitute a voting age majority in a single member district, (App. at 497a-501a), and
- the minority group voted cohesively (App. at 501a-533a), and
- a white voting bloc usually defeated the choice of the minority voters. (App. at 501a-533a)

As required, the district court made findings regarding the "typical factors" indicating the existence of vote dilution, (App. at 533a-538a) as discussed in the Senate Report, No 97-417, 97th Congress 2d Sess., reprinted in 1982 U. S. Code Cong. & Admin. News at pp. 177 *et seq.*, that is a part of the legislative history of the 1982 amendments to the Voting Rights Act.[1]

The trial court found that there was a history of discrimination that touched upon minority access to the political system (App. at 533a-534a); that there was a numbered post system that enhanced the discriminatory effect of at-large voting (App. at 534a-535a); that five of the nine counties were so large as to enhance the difficulty of minority candidates running at large, (App. at 534a-535a);

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[1]This Court has characterized the Senate Report as an "authoritative source" for interpreting amended Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7. (1986).

and that there had been racial appeals in two recent races in Dallas County. (App. at 535a). In addition, the court found that there was a persistent lack of electoral success of minority candidates for judicial offices. (App. at 536a-537a). Plaintiffs did not raise the issue of lack of responsiveness of elected officials.

Plaintiffs charged that the reasons for the use of at-large elections were tenuous. Although the court found that the reasons offered by the State of Texas for the maintenance of the at-large system of elections were not pretextual, they also were not compelling. (App. at 537a-538a).

Finally, based upon the "totality of the circumstances," the trial court found that minority voting strength was diluted in each of the targeted counties. (App. at 545a-546a).

2. *The First Series of Fifth Circuit Rulings*

Defendants and Defendant-Intervenors appealed to the United States Court of Appeals for the Fifth Circuit. On May 11, 1990, that court reversed the district court, holding 2-1 that trial judges elected at large in multi-member districts nevertheless occupy single-member offices that are incapable of being further sub-divided and to which Section 2 principles have no application. 902 F. 2d 293 (5th Cir. 1990). Four days later, pursuant to a majority vote of the active judges *sua sponte*, a rehearing *en banc* was ordered, 902 F. 2d 322, and on September 28, 1990, the *en banc* court reversed the trial court in a severely split opinion. 914 F. 2d 620 (5th Cir. 1990).

The majority opinion held that the amended Section 2 of the Voting Rights Act, which incorporates a "results test," does not apply to judicial elections, regardless of how discriminatory the system may be.

3. *This Court's Prior Decision In This Case*

This Court granted certiorari, 498 U.S. 1060 (1991), and reversed, holding that the Voting Rights Act does apply to state judicial election systems. The case was remanded for further proceedings consistent with this Court's opinion. *Houston Lawyers Association v. Attorney General of Texas*, 501 U. S. ___, 115 L.Ed. 2d 379 (1991).

4. *The Second Series of Fifth Circuit Rulings*

Upon return of the case to the Fifth Circuit, plaintiffs moved to remand the case to the District Court for further fact finding in light of this Court's decision. Instead, the court ordered further argument and the original panel affirmed the district court opinion in eight of the nine challenged counties. *LULAC v. Clements*, 986 F. 2d 728 (5th Cir. 1993)(App. at 203a-486a). Within a few days, *sua sponte*, the Fifth Circuit voted to hear the case *en banc*. 986 F. 2d 874 (5th Cir. 1993)(App. at 486a).

After the panel opinion was issued, the Attorney General and Secretary of State of Texas, named defendants in this action, joined by the Governor and Lieutenant Governor, and with the approval of a majority of the Texas House of Representatives and a majority of the state Senate, which voted as the Committee of the Whole, entered into a settlement agreement with all of the Plaintiffs and Plaintiff-Intervenors. Under the agreement, judicial elections in the nine counties would be held under a sub-districting plan, with some at-large elections retained in Dallas and Harris Counties. The settlement was not joined by Defendant-Intervenors Wood and Entz[2], or by the Defendant members of the Texas Judicial Districts Board.

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[2] State district judges Wood and Entz had intervened in their personal capacities only.

A joint motion was filed by the plaintiffs and the state officials with the Fifth Circuit requesting that the case be remanded to the District Court for a hearing and findings on the proposed settlement. Chief Justice Phillips, in his capacity as chair of the Judicial Districts Board, and intervenor judges Wood and Entz opposed this motion.

On August 23, 1993, the *en banc* court, 9-4, denied the request to remand, reversed the district court's opinion, and held that there was no violation of the Voting Rights Act in any of the nine targeted counties. 999 F.2d 831 (5th Cir. 1993)(App. at 1a-202a).

5. *The Decision Below*

The majority opinion held that:

a. Texas' Governor, Lieutenant Governor, Secretary of State, and Attorney General, and a majority of its legislators in both houses, could not enter into a settlement of this litigation over the objection of one defendant (chair of the Texas State Judicial Districts Board), who had been sued in his official capacity only, and of two defendant-intervenors who entered the case in their personal capacities only.[3] In addition, according to the majority, once certain "legal errors" of the district court were corrected, there was nothing to settle. (App. at 10a-25a.)

b. Plaintiffs failed to establish the threshold factor of "racial bloc voting" in this case because only one major party nominated minority-race candidates supported by minority

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[3] Under the settlement agreement, the judicial positions occupied by Defendant-Intervenors Wood and Entz would continue to be elected county-wide as they were before the suit was brought. *See supra* note 2 (Wood and Entz intervened in personal capacities only).

voters. Although white voters refused to support minority-race candidates favored by minority voters — and only voted for minority-race candidates who lacked support from minority voters — this pattern was thus the result of partisan politics and not racial bloc voting, which the court defined as a voting pattern caused by a "built-in bias" among white voters. (App. at 38a-39a.)

c. The extremely low rate of electoral success by minority candidates for judicial office in the nine challenged counties was not probative of discrimination, whatever the minority population in these counties, because of the assertedly small number of minority lawyers in these jurisdictions. (App. at 62a-64a.)

d. Notwithstanding the undisputed existence of pervasive discrimination in the past and no matter how small the electoral success of minority candidates may be, in order to establish a violation of Section 2 plaintiffs must prove that the continuing effects of that discrimination currently prevent racial minority citizens from fielding candidates and running campaigns. (App. at 64a-68a).

e. The extent of the state's interest in maintaining at-large judicial elections is a question of law as to which an appellate court may make a *de novo* determination (App. at 74a-76a); instead of being considered as but one of many factors in determining whether there has been vote dilution, the state's alleged interest in having the electoral district and territorial jurisdiction of its district judges coterminous is so weighty that a Section 2 violation can be found only upon a very substantial showing of vote dilution (App. at 69a).

There were three dissenting opinions. Chief Judge Politz (App. at 130a-134a), asserted that since the real party in interest in this matter is the State of Texas, the Attorney General had the authority to settle on behalf of the state, despite the opposition of some elected state officials. (App.

at 132a). Judge Wiener, both concurring with Judge Politz and writing separately, maintained that the case should have been remanded for consideration of the settlement agreement. (App. at 202a).

The opinion by Judge King also favored a remand for a hearing on the proposed settlement. (App. at 135a-202a.)[4] In addition, this dissent asserted that the majority opinion rewrote the law as declared by this Court in requiring plaintiffs to negate partisan politics as a possible explanation for minority candidates' defeat at the polls, and essentially required plaintiffs to prove racial *animus* in the electorate in order to meet that burden. (App. at 137a-138a).

Statement of Facts

Texas district courts are the state's trial courts of general jurisdiction. *Texas Const.*, Art. 5, §8. District courts are created by statute, *Tex. Govt. Code* §24.101 ff. Each court, or judicial district, at issue in this case encompasses an entire county, with the exception of the 72nd Judicial District, which covers two counties. *Tex. Govt. Code* §24.174.[5]

Elections for judges are staggered, and are held every four years for each of the courts on a county-wide basis in

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[4]Judge King's dissent incorporates by reference (App. at 136a, n.1) her decision for the panel majority. See App. at 203a-375a.

[5] Art. 5, §7a(i) of the Texas Constitution requires that judicial districts be no smaller than a county unless authorized by a majority of the voters in the county. To date, this mechanism has not been utilized.

partisan elections. Each candidate must file for a specific court, or numbered post. Party primaries have a majority-vote requirement, *Tex. Elec. Code* §172.003, but in the general election, a plurality of the votes determines the winner. *Tex. Elec. Code* §2.001. Vacancies are filled by gubernatorial appointment, *Tex. Const.*, Art. 5, §28.

Qualifications for office are set by the state constitution, *Tex. Const.*, Art. 5, §7, and by statute, *Tex. Govt. Code*, §24.001 ff.

Although a district judge usually sits in the county from which he/she is elected, the jurisdiction of every district court is statewide. *Nipper v. U-Haul Co.*, 516 S. W. 2d 467, 470 (Tex. Civ. App. 1974). Venue, on the other hand, is governed by a complex set of statutes. *Tex. Civ. Prac. & Rem. Code*, Ch. 15.

Minority electoral success for judicial offices has been minimal. A review of the targeted counties reveals the following:

County	No. of Judges	No. of Minority Judges	Total Pop.	Percent Minority[6]
Harris	59	3 (5%)	2,409,544	19.7%
Dallas	37	2 (5%)	1,556,549	18.5%
Tarrant	23	2 (9%)	860,880	11.8%
Bexar	19	5 (26%)	988,800	46.6%

[6]"No. of Minority Judges" and "Percent Minority" here refer only to the ethnic or racial group, *i.e.*, African Americans or Hispanics, on whose behalf a case was presented to the district court for the particular county.

County	No. of Judges	No. of Minority Judges	Total Pop.	Percent Minority
Travis	13	0 (0%)	419,335	17.2%
Jefferson	8	0 (0%)	250,938	28.2%
Lubbock	6	0 (0%)	211,651	27.1%
Ector	4	0 (0%)	115,374	25.9%
Midland	3	0 (0%)	82,636	23.5%

Perhaps more revealing of the lack of minority access is the fact that in Harris County only two Blacks had defeated whites in seventeen contested judicial elections. In Dallas County, no Black candidate supported by Black voters won. Bexar County results revealed that only one Hispanic had been victorious over a white in six contests. In the other targeted counties, no minority had ever won. In Jefferson, Lubbock, Ector and Midland counties, no minority had ever run. (App. at 501a-533a).

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CLEAR HOLDINGS IN *THORNBURG V. GINGLES* AND *HLA V. ATTORNEY GENERAL OF TEXAS*

The Fifth Circuit's decision in this case nullifies the plain holding of this Court in *Houston Lawyers' Association v. Attorney General of Texas*[7] (*HLA*): there is no single-person office exception that excludes elections for trial judges from Section 2 coverage. Having abandoned its argument that single person offices such as trial judges are *statutorily* exempted from Section 2, the Fifth Circuit instead creates a new test for determining vote dilution in judicial elections cases that *functionally* exempts those offices from Section 2 coverage. This new test for vote dilution has several distinctive features that conflict with this Court's opinions in *HLA* and *Thornburg v. Gingles*, 478 U.S. 30 (1986).

First, the Fifth Circuit's more stringent vote dilution test imposes a higher standard of proof on plaintiffs in proving that at-large elections violate Section 2. Second, the Fifth Circuit holds that the weight to be afforded the state's interest in the dilution analysis is a matter of law, not an issue of fact. Both these holdings contradict this Court's clear elaboration of the results test set out in *Thornburg v. Gingles*, and this Court's decision in *HLA*, that the "results" test (as explicated in *Gingles*) is applicable to cases challenging judicial elections.

The results test for assessing vote dilution claims was established by Congress in the Senate Report that

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[7]501 U.S. ___, 115 L.Ed. 2d 379 (1991).

accompanied the 1982 amendments to Section 2.[8] In the Senate Report, Congress describes the proof required for plaintiffs to establish a violation of Section 2, and enumerates a list of factors which, if proven by plaintiffs, typically indicate the existence of racial vote dilution.[9]

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[8]*See supra* note 1.

[9]The Senate Report factors are a modified version of the factors set out by the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973).

The typical factors identified by Congress include:

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction."

"Additional factors that in some cases have had probative

This Court in *Thornburg v. Gingles, supra,* adopted the standards identified by Congress for assessing Section 2 vote dilution claims. In particular, the *Gingles* defines the plaintiffs' burden of proof in Section 2 challenges to multimember or at-large elections: Plaintiffs must first prove the existence of three threshold matters: (1) that the minority group is sufficiently numerous and geographically compact to constitute a majority of a fairly drawn single-member district; (2) that the minority group is politically cohesive and (3) that the white majority votes sufficiently as a bloc to enable it to defeat the candidates of choice of minority voters, absent special circumstances. 478 U.S. 50-51. Once plaintiffs have made this showing, *Gingles* explains, minority plaintiffs may provide evidence of any of the nine Senate Report Factors, which tend to prove the existence of racial vote dilution. Proof of these factors is "supportive of, but *not essential* to, a minority voter's claim." 478 U.S. at 48-49, n.15 (emphasis in original). Moreover, failure "to establish any particular factor, is not rebuttal evidence of non-dilution." S. Rep. at 29 n.118.

The *Gingles* standard applies to claims challenging the at-large election of trial court judges. In *HLA, supra,* this

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value as part of plaintiffs' evidence to establish a violation include:

> "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

S. Rep. No. 97-417, 97th Cong., 2nd Sess. (1982) at 28-29.

Court unequivocally held that the election of trial court judges is covered by Section 2 of the Voting Rights Act of 1965, as amended, and that the "results" test is the appropriate test for determining claims challenging judicial elections under Section 2. 115 L.Ed. 2d at 388.

The court below refused to apply *Gingles* to the judicial elections at issue in this case. Instead, in reviewing the district court's finding of vote dilution in judicial elections in Texas, the Fifth Circuit fashioned a new vote dilution analysis for judicial elections in which the "state's interest" in continuing to use at-large elections is balanced against plaintiffs' proof of vote dilution. App. at 85a-86a. Under this analysis, the plaintiffs' burden is to prove that the existing racial vote dilution in the jurisdiction is "substantial enough to override the state's . . . interest." App. at 86a. This standard is directly at odds with this Court's description of the plaintiffs' burden of proof in *Gingles* and with the statutory requirements enacted by Congress.

This Court has never accorded the state's interest primary or controlling weight among the various factors to be considered by courts in assessing vote dilution claims under Section 2. Indeed, only two years ago in *HLA*, this Court instructed the appellate court on remand that the state's interest "is *merely one factor* to be considered in evaluating the 'totality of circumstances.'" 115 L.Ed. 2d at 387 (emphasis added). Rather than follow this Court's clear instructions as to the role of the state's interest, the court below decided that the state's interest is a primary or outcome-determinative factor in a Section 2 case. App. at 85a-86a.

According controlling weight to any one factor in the dilution analysis, and to the "state's interest" in

maintaining the use of at-large elections in particular, is at odds with *Gingles*' admonition that no specific factor or group of factors must be proved in order for plaintiffs' to prevail,[10] 478 U.S. at 49 n.15, and with this Court's acknowledgment that at-large elections, while not *per se* violative of the Act, tend to minimize or cancel out minority voting strength. *See* 478 U.S. at 47-48, citing *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *White v. Regester*, 412 U.S. 755, 765 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971); and *Burns v. Richardson*, 384 U.S. 73, 88 (1966). In essence, the Fifth Circuit has transformed the ninth Senate Report factor — "whether the policy underlying the state or political subdivision's use of [the challenged voting practice] is tenuous" — into an immunizing shield for States.[11] In *HLA*, this Court acknowledged that "[a] State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry." 115 L.Ed. 2d at 387. But in rejecting the notion that single-person offices were exempt

---

[10]While proof of the existence of the Senate Report factors are not essential to a minority voters' claim, 478 U.S. at 49 n.15, this Court has held that the three *Gingles* preconditions must be established to prove that a multimember district impairs minority voting strength. 478 U.S. at 50.

[11]The elevation of the "state's interest" factor in the dilution analysis is particularly unwarranted because this factor, along "with whether elected officials are responsive to the needs of minorities," was reduced by Congress from among the primary factors listed to an optional part of the plaintiffs' case. See S. Rep. at 29. Prior to Congress' amendment of the statute, "the state's interest" and the "responsiveness" factors were listed equally among the other *Zimmer* factors. *Compare Zimmer*, 485 F.2d at 1305, *with* S. Rep. at 28-29.

from Section 2, this Court specifically cautioned against giving the state's interest controlling weight in the analysis.[12]

In fact, this Court in *Gingles* decided that the two Senate Report factors which are most probative of racial vote dilution are proof of racially polarized voting and the extent to which minority voters are able to elect their candidates of choice. 478 U.S. at 48-49 n.15. The Fifth Circuit rejected this Court's directions and instead instructed that "proof of racial appeals in elections, non-responsiveness of elected officials to minority voters and persistent lack of electoral success by minority candidates are most important." App. at 86a.

Finally, the Fifth Circuit's holding that the weight of the State's interests in using at-large elections "is a question of law for this court to determine de novo and not a question of fact" (App. at 76a), runs squarely counter to this Court's holdings in *Gingles* that "the

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[12]This Court also rejected the notion that the multiple trial judges elected from the counties at issue in this lawsuit are, in fact, single-person offices. Instead this Court described the system of electing district judges as the archetypal at-large, numbered-post election system. Each of the district judges at issue in this suit is

> elected by the voters in the district in which he or she sits pursuant to an at-large, district-wide electoral scheme . . . . Although several judicial candidates in the same district may be running in the same election, each runs for a separately numbered position. Thus, for example, if there are 25 vacancies in the Harris County district in a particular year, there are 25 district-wide races for 25 separately numbered positions.

HLA, 115 L.Ed. 2d at 384.

ultimate finding of vote dilution" is a question of fact, subject upon review to the clearly erroneous test, 478 U.S. at 79, and that the "subsidiary issues" to a finding of vote dilution are also subject to the clearly erroneous standard. 478 U.S. at 78.

The district court in this case followed the *Gingles* analysis in reaching its conclusion that the judicial elections at issue violate Section 2. In its 94-page opinion, the district court engaged in a fact-intensive "'searching practical evaluation'" of the political reality facing minority voters in the nine counties at issue. *Gingles*, 478 U.S. at 79. Its conclusion that the countywide election system for district judges dilutes the voting strength of African American and Hispanic voters[13] was based on the plaintiffs' proof of the three *Gingles* threshold factors, and proof of several of the Senate Report factors. The Court of Appeals ignored the findings of the district court, yet never asserted that those findings were clearly erroneous. Instead, the Court of Appeals made its own factual findings with regard to the State's interest and declared that these were matters of law to be determined *de novo* by the appellate court. This approach to review of vote dilution cases conflicts with this Court's admonition in *Gingles* that appellate courts must defer to the "trial court's particular familiarity with the indigenous political reality," 478 U.S. at 79, and warrants review of the decision below.

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[13]The district court's findings as to the existence of vote dilution in Harris and Dallas counties was limited to African Americans, as no claim on behalf of Hispanic voters was advanced by the plaintiffs in those two counties.

II.
THE FIFTH CIRCUIT'S RULING CONFLICTS WITH THE DECISION OF THE ELEVENTH CIRCUIT IN *NIPPER V. SMITH* AS TO THE APPROPRIATE TEST FOR DETERMINING VOTE DILUTION IN JUDICIAL ELECTIONS CASES

In the recent case of *Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1993), the Eleventh Circuit held that in judicial election cases, races in which only white candidates ran are not properly considered in determining whether racial bloc voting exists if racially polarized voting is shown to occur in contests involving minority candidates supported by minority voters; and further held that in assessing minority candidates' electoral success in judicial elections, the number of minority voters, *not* the number of minority attorneys in the jurisdiction, is the relevant statistical benchmark. The ruling below conflicts with the Eleventh Circuit's decision in *Nipper* on both points and the conflict demands resolution by this Court.

In its opinion the Eleventh Circuit holds that a proper analysis of racially polarized voting should not rely "primarily on elections involving only white candidates." 1 F.3d at 1179-80. Thus, that court said, "a consistent showing of polarization involving black and white candidates cannot be rebutted by evidence that black voters' candidates of choice sometimes win when only white candidates are running." *Id.* at 1180. When such a showing has been made, it is error to find no racial bloc voting on the ground that "'[w]hen judicial elections not involving black candidates are included in the analysis, the black candidate of choice for circuit or county judge wins the majority of the time'." *Id.*

The court below held, however, that voting was not racially polarized in the counties at issue in this case based on an analysis of election results, including primarily contests not including black candidates. For example, with respect to Harris County the Fifth Circuit discounted the district court's findings of consistent polarization in elections involving black and white candidates, and of consistent lack of electoral success of black-preferred *black* judicial candidates. It found, instead, that black voters are able to elect their preferred candidates in 52.4% of the election contests, when elections not involving black candidates are included, App. at 99a, and made a finding that voting is not racially polarized based on this "willingness of white voters to support black Republican candidates" not preferred by the black voters, and the consistent success of black-preferred white or Hispanic judicial candidates. App. at 102a.

The approach flatly contradicts the more realistic appreciation of electoral realities of the Eleventh Circuit:

> In sum, given the pervasive polarization in the elections involving black and white candidates, we hold that the district court erred in relying on elections involving only white candidates. Under these circumstances, evidence that black voters are sometimes able to elect candidates of choice in white only elections was an insufficient basis to find against appellants on the issue of racial polarization.

Nipper v. Smith, 1 F.3d at 1180.

The ruling below also conflicts with the Eleventh Circuit's decision in *Nipper* as to the proper method for assessing minority electoral success in the challenged jurisdiction. The Eleventh Circuit in *Nipper* held that the

district court had erred in appraising minority electoral success in obtaining representation on the judiciary based on a comparison of the number of black judges to the low number of black attorneys eligible for judgeships. Instead, the Eleventh Circuit found that "the appropriate comparison is the percentage of black citizens or black voters, not the percentage of black lawyers." 1 F.3d at 1181, n. 13.

The court below here, however, analyzed minority electoral success in the challenged counties in a manner that precisely mirrored the *Nipper* district court's reasoning that was rejected by the Eleventh Circuit. The Fifth Circuit disregarded the district court's findings in this case concerning, for example Texas' historical discrimination against African Americans and Hispanics in education and employment, and its conclusion that the pool of eligible lawyers was small because of that discrimination. (App. 533a; 536a-537a.) Rather, the court of appeals concluded that minority electoral success should be assessed based on the number of eligible minority attorneys.[14]

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[14]In making this comparison, the Fifth Circuit did not discuss the evidence regarding the number of eligible attorneys in each of the nine counties at issue, but instead made the blanket statement that "[t]he cold reality is that few minority citizens can run for and be elected to judicial office." App. at 63a. The court made no reference to the evidence in the record that in 1988 in Harris County, for example, there were over 500 African American attorneys were eligible to serve as district judges, and African American candidates ran in 17 contested district judge general elections between 1980 and 1988.

The conflicts between the Fifth and Eleventh Circuits concerning the method of establishing the *Gingles* threshold factor of racial bloc voting, and concerning the method of evaluating minority electoral success are of paramount significance, since most of the States in which litigation under the Voting Rights Act of 1965 has been brought are within these two federal judicial divisions. This Court should, accordingly, grant certiorari to resolve those conflicts.

III.

THE COURT OF APPEALS' HOLDING THAT THE DEFENDANT OFFICIALS OF THE STATE OF TEXAS COULD NOT ENTER INTO A PROPOSED SETTLEMENT OF THIS CASE PRESENTS AN IMPORTANT ISSUE THAT SHOULD BE RESOLVED BY THIS COURT

As set out *supra* in the Statement of the Case the plaintiffs and the official state defendants negotiated a proposed settlement of this litigation. The settlement was agreed to by the Attorney General of the State of Texas, a named defendant, in his capacity as counsel for the state officials, the Governor, Lieutenant Governor and Secretary of State, and was approved by majority votes of both houses of the legislature of Texas. The parties to the settlement filed a motion with the Fifth Circuit seeking a remand to the district court for a hearing at which any objections, including those of intervenors, could be heard. The Court of Appeals, however, refused to remand the case, but instead decided the merits of the case.

As this Court has repeatedly held, the settlement of cases is highly favored. *See, e.g., Evans v. Jeff D.*, 475 U.S.

717, 732-33 (1986); *Marek v. Chesny*, 473 U.S. 1, 10 (1985). Thus, an intervenor cannot stop the original parties from entering into a settlement of the claims between them. As *Local Number 93, International Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 528-29 (1986), held:

> It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearing on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.[15]

Moreover, it is clear that a public agency has the power to settle a case for relief that goes beyond that which the Constitution or laws might require. *Rufo v. Inmates of Suffolk Jail*, 502 U.S. ___, 116 L.Ed.2d 867, 889 (1992). *See also*, *Wise v. Lipscomb*, 437 U.S. 535, 548 (1978)(Powell, J. concurring).

The decision below conflicts with the principles of all of these cases. Moreover, it raises troubling questions concerning the appropriateness of a federal court's overruling the decision of state officials to compromise litigation and substituting its judgment as to the best interests of a state. In the present case, the Attorney General, the Governor, the Lieutenant Governor, the Secretary of State, and a majority of both houses of the

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[15]Here, the parties sought a remand so that the intervenors and any one else could voice objections at a hearing before the district court.

Texas Legislature made clear their wish to compromise the action and to modify the method of election of state court judges. It is also clear that they had valid reasons to do so, in light of the decision of the district court, the holding of this Court in *HLA v. Attorney General*, and the resultant substantial possibility that there was a violation of the Voting Rights Act. Nevertheless, the Court of Appeals overruled the considered judgment of those most suited to deciding the interests of the State of Texas on the most tenuous grounds.[16]

To petitioners' knowledge, the decision below is an unprecedented departure from the accepted and usual course of judicial proceedings. Moreover, the Fifth Circuit's approach could undermine the mutually acceptable settlement of hundreds of constitutional and statutory lawsuits. Therefore, the decision below calls for an exercise of this Court's power of supervision over the lower federal courts.

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[16]As the dissents below noted, there is a serious question whether any of the parties blocking the settlement had standing to do so. Justice Phillips was a nominal defendant, one of many joined in his official capacity in order to satisfy *Ex Parte Young*, 209 U.S. 123 (1908). Judges Entz and Wood were allowed to intervene in their individual capacities only in order to protect their interest in retaining the judicial offices they held. The proposed settlement would not affect the manner in which their offices were elected. The proposition that they could block, rather than simply voice objections to, a settlement entered into by state officials because they are voters raises the specter of any citizen being able to block any settlement desired by public officials.

IV.
THE FIFTH CIRCUIT FAILED TO ADHERE TO THIS COURT'S MANDATE WHEN IT DID NOT REMAND THE CASE TO THE DISTRICT COURT FOR A DETERMINATION OF THE FACTUAL ISSUE OF THE WEIGHT TO BE GIVEN TO THE STATE'S INTEREST IN AT-LARGE ELECTION OF TRIAL COURT JUDGES.

The court below held that the interest of the State of Texas in maintaining the present at-large electoral system must be weighed against proven vote dilution to assess whether such dilution creates Section 2 liability. The court further held that the substantiality of Texas' interest under Section 2 is a question of law reviewable *de novo*, and not a question of fact. App. at 76a. In so holding, the Fifth Circuit failed to adhere to this Court's express holding in *Houston Lawyers Association* that the state's interest in the maintenance of the at-large system is *one factor* to be considered under the "*totality of the circumstances*," and is therefore a question of fact to be determined by the trial court. The Fifth Circuit, therefore, erred by conducting a fact-finding expedition and failing to adhere to this Court's mandate to remand this case to the district court in the first instance for a factual determination regarding the sufficiency of the state's interest in "linkage" in the overall "totality of the circumstances" calculation.

As explicitly noted by this Court, the "State's interest in maintaining an at-large, district-wide electoral scheme . . . is merely one factor to be considered in evaluating the 'totality of the circumstances' . . . ." *HLA*, 115 L.Ed. 2d at 387. As mentioned above, application of the "totality of the circumstances" tests requires a court to make

factual findings to determine whether minority voting strength is minimized or cancelled out. *See Thornburg v. Gingles*, 478 U.S. at 77-80. The appropriate fact finder in this case is the district court and not the court of appeals.

The Fifth Circuit relied principally on the proposition that Texas links the electoral and jurisdictional bases of trial court judges to hold that the state has a substantial interest in maintaining the present at-large electoral system. App. at 70a. However, at trial the state only perfunctorily touched on the linkage interest in two isolated references in the testimony of two witnesses, Chief Justice Thomas Phillips and Dr. Anthony Champagne, a political scientist.[17] Since the state did not prove at the trial level that linkage is, in fact, a Texas state policy, or, indeed, that the electoral and jurisdictional bases are indeed linked,[18] it was error for

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[17] Chief Justice Phillips testified: "in my opinion, the district judge should not be responsible to the voters over an area that is smaller than that area in which the district judge exercises primary jurisdiction." TR at 5-78 (emphasis added). Similar testimony was presented by Dr. Champagne. *See* TR. 4-141-144. At trial, the state offered three reasons to support its interest in using the challenged election system: "1) judges elected from smaller districts would be more susceptible to undue influence by organized crime; 2) changes in the current system would result in costly administrative changes for District Clerks' offices; and 3) the system of specialized courts in some counties would disenfranchise all voters' right to elect judges with jurisdiction over some matters." App. at 537a.

[18] In fact, as Judge King demonstrated in her dissent and in her opinion for the panel below, no such linkage exists, since it is clear that under Texas law trial court judges are elected from counties but have state-wide jurisdiction. *Nipper v. U-*

the Fifth Circuit to act as the trier of fact and determine that there is linkage of the electoral and jurisdictional bases for trial judges, and to determine that any such linkage provides the state with a substantial interest in maintaining the present at-large electoral system.

The *en banc* court states that "*under the totality of the circumstances*, . . . breaking the link between the electoral base and the jurisdiction . . . would perversely lessen minority influence on the conduct of most litigation." (App. at 78a)(Emphasis added.) The court simply creates this finding out of thin air, as no evidence was offered by the State of Texas below to prove that any purported linkage preserves *minority influence*.

In examining the *en banc* opinion, it is clear that the Fifth Circuit engaged in a fact finding mission, thereby committing error by failing to adhere to this Court's mandate to remand this case in the first instance to the district court to develop a factual record to consider whether Texas indeed had any interest in "linkage" under the totality of the circumstances.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and reverse the decision below.

Haul Co., 516 S.W.2d 467, 470 (Tex. Civ. App. 1974). *See*, App. at 174a-176a; 269a-275a. *See also*, McDuff, *Judicial Elections and the Voting Rights Act*, 38 LOY. L. REV. 931, 956-57 (1993).

Respectfully submitted,

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No. 93-630

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, HOUSTON LAWYERS' ASSOCIATION, JESSE OLIVER, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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NOTE: **Various of the opinions below cross-reference other opinions by citing to pages in the official reports. In this Appendix, such references are to pages in the Appendix and are indicated by brackets, *e.g.*, [214a].**

[En Banc Decision of the Court of Appeals
August 23, 1993]

LEAGUE OF UNITED LATIN AMERICAN CITIZENS,
COUNCIL NO. 4434, ET AL.
Plaintiffs-Appellees,
and

JESSE OLIVER, ET AL.,
Intervening Plaintiffs-Appellees,

v.

WILLIAM P. CLEMENTS, Etc.
Defendants,

JIM MATTOX, ET AL.,
Defendants-Appellees-Appellants,

v.

JUDGE F. HAROLD ENTZ, Etc., JUDGE SHAROLYN WOOD, Etc., and GEORGE S. BAYOUD, JR., Etc.,
Defendants-Appellants,

and

TOM RICKHOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE and MICHAEL P. PEDAN, Bexar County, Texas State District Judges,
Appellants.

United States Court of Appeals
Fifth Circuit

Aug. 23, 1993

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Appeal From the United States District Court
for the Western District of Texas

Before POLITZ, Chief Judge, KING, JOHNSON, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, and DeMOSS, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

Over the past fifty years, the steady march of civil rights has been to New Orleans and this court. It continues but the demands have changed. Relatively clear lines of legality and morality have become more difficult to locate as demands for outcomes have followed the cutting away of obstacles to full participation. With our diverse ethnic makeup, this demand for results in voting has surfaced profound questions of a democratic political order such as the limits on rearranging state structures to alter election outcomes, and majority rule at the ballot box and even in legislative halls, questions Congress has provoked but not answered. All this can make a simple voting rights case seem difficult, certainly so with state judges elected on a partisan ballot. Today our difficulties of fitting the Act to the unique features of the state judiciary and sorting out

racial and partisan voting are large but the merits of the claims are easily grasped. As we will explain, there is a background to the debate on the large issues that must not be obscured. The evidence of any dilution of minority voting power is marginal at best. We are not persuaded that a violation of the Voting Rights Act has been proved and we reverse.

I. Facts

On July 11, 1988, ten individual voters and the League of United Latin American Citizens sued in federal district court alleging that Texas' system of electing state trial judges violated § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments in several Texas counties.[1] They sued the Governor of Texas,[2] the Attorney General, the Secretary of State, and the Chief Justice of the Supreme Court as chair of the Judicial Districts Board. Because this board is responsible for reapportioning the judicial districts, the suit also named each of its members as defendants. On March 12, 1989, the district court granted the motions to intervene of the Houston Lawyers' Association, the Legislative Black Caucus, and two Texas district court judges, in their individual capacities--Sharolyn Wood, 127th District Court in Harris County, and Harold Entz, 194th District Court in Dallas County.

As they have throughout Texas history, Texas voters elect their trial judges in county-wide elections. A voter may vote for all of the trial courts of general jurisdiction in her county. At the same time, each trial court is a distinct court, such as the 134th judicial district court of Dallas County, with county-wide jurisdiction and its own history of

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[1]Plaintiffs originally challenged the election of district judges in 44 counties, but by trial, winnowed their targets to the following nine urban counties: Harris County, Dallas County, Travis County, Tarrant County, Jefferson County, Ector County, Bexar County, Midland County, and Lubbock County.

[2]Plaintiffs early in the case dismissed the Governor.

incumbents. A candidate runs for a particular court. Plaintiffs contend that electing trial judges county-wide violates § 2 of the Voting Rights Act by impermissibly diluting the voting power of Hispanics and blacks. Plaintiffs proceed on behalf of language and ethnic minorities in different combinations in different counties. Depending on the county--more specifically, the numbers--they argue that Hispanic voters, black voters, or the combination of both Hispanic and black voters "have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." Plaintiffs aimed their constitutional challenge at Article 5, § 7a(i) of the Texas Constitution, which precludes the creation of judicial districts smaller than a county absent approval by a majority of the voters in that county. They argued that this limitation on the power to redistrict of the Judicial Districts Board, chaired by defendant Chief Justice Phillips, was enacted with discriminatory intent.

On November 8, 1989, the district court found county-wide elections violated § 2 in all nine counties, enjoined future elections, divided the nine counties into electoral subdistricts, and ordered a nonpartisan election for May 5, 1990, with any runoff to be held on June 2. The district court rejected the constitutional arguments, finding that plaintiffs had failed to prove that Texas instituted or maintained the electoral system with discriminatory intent.[3] Intervenors Judge Wood and Judge Entz appealed. Unhappy with nonpartisan elections ordered by the district court, the Texas Attorney General first moved the court to alter its interim plan. After the court denied the motion, the Attorney General filed a notice of appeal.[4] We stayed the

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[3]This ruling was not appealed.

[4]Former Secretary of State George S. Bayoud, Jr., a named party defendant, objected to the Attorney General's decision not to appeal immediately. Bayoud took the position that as chief elections officer

(continued...)

district court's order pending appeal.

In our first effort in this case, a panel held that the Act covers judicial elections but concluded that electing district judges in county-wide elections in Texas did not violate § 2. *League of United Latin American Citizens v. Clements*, 902 F.2d 293 (5th Cir. 1990) ("*LULAC I*"). We considered the history of judicial elections in Texas and the office of district judge--the court of general jurisdiction. We held that Texas had a special interest in linking the jurisdictional and electoral bases of the trial courts, an interest accented by unwavering support throughout Texas history. Finding no truly informing analogues for resolving such an attack on at-large voting supported by a state interest unique to this judicial office, we looked to the weighing constructs familiar to the Act. We concluded that, as a matter of law, the state interest linking jurisdiction and electoral base outweighed its potentially dilutive effect. *LULAC I*, 902 F.2d at 308.

A majority of this court *sua sponte* ordered reconsideration of the panel decision *en banc*. *League of United Latin American Citizens v. Clements*, 914 F.2d 620 (5th Cir. 1990) ("*LULAC II*"). The *en banc* court held by a 7-6 vote that § 2 of the Act did not apply to judicial elections, rejecting the contrary view of the panel.

Houston Lawyers' Association, as intervenor, and LULAC petitioned for certiorari. The Supreme Court granted both petitions, consolidated them, and reversed, holding that the Voting Rights Act applies to state judicial elections. *Houston Lawyers' Ass'n v. Attorney General*, ___ U.S. ___, 111 S.Ct. 2376 (1991). The Supreme Court also held that Texas has a special interest in linking the electoral and jurisdictional bases of district judges. *Id.* at ____, 111

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[4](...continued)
of the State of Texas, he was the Attorney General's client and the Attorney General must represent his interests. Bayoud obtained independent counsel and filed a notice of appeal himself.

S.Ct. at 2381. The Court did not agree, however, that this state interest outweighed its dilutive effect in all cases, as a matter of law. Rather, the Court held that balancing is a case-specific enterprise, struck by inquiry into the totality of the circumstances. Justice Stevens explained that the state interest in linkage was to be weighed in deciding "whether a § 2 violation occurred." *Id.* Justice Stevens made plain that assessing the linkage interest is part of the determination of liability and not remedy alone. The Court effectively came down between the "goes only to remedy" view of the Department of Justice and the "matter of law" view of the concurring opinion in *LULAC II*.

On remand, the *en banc* court in turn remanded to the panel. On January 27, 1993, a majority of the panel affirmed the district court's findings in eight of the nine counties. The panel concluded that plaintiffs failed only in Travis County, a Democratic stronghold. *League of United Latin American Citizens v. Clements*, 986 F.2d 728 (5th Cir. 1993) (*LULAC III*). For a second time, this court decided, on its own motion, to hear the case *en banc*.

Although the panel opinion had been vacated, General Morales urged a legislative solution to reforming judicial elections. He submitted a plan to the legislature calling for the election of judges from single-member districts in *all* Texas counties with populations over 100,000. Recognizing that the Texas Constitution mandates the current system of electing trial judges, *see* Tex. Const. Art. 5, §§ 7, 7a(i), Morales asked the legislature to submit a constitutional amendment to the voters to implement his plan and urged them to do so in time to moot the *LULAC* lawsuit. Doubting the necessary legislative support for an amendment, the Governor, the Lieutenant Governor, and minority lawmakers urged Morales to achieve the same result through settlement. Morales drafted an agreement providing for the election of the vast majority of judges in the nine urban counties by subdistricts. Democratic officials who were parties to the suit quickly agreed. But Morales could not obtain the agreement of Chief Justice Phillips, nor

the district judges, Judge Wood and Judge Entz.

When a proposed resolution approving the "agreement" reached the floor of the Senate there was no quorum because all but two of the thirteen Republican senators walked out. The Senate later reconvened as a Committee of the Whole, not in formal session, and voting along party lines, adopted a resolution expressing its "sentiment" in support of a federal decree. Voting in the House also followed party lines. Nothing with the force of law could be obtained from the legislature. When the dust settled, the only legislative action was this expression of sentiment in support of a federal decree, and that from a Senate convened in a Committee of the Whole. Failing to obtain any positive enactment from the legislature, Morales requested that we remand to the district court for a hearing and entry of his proposed "consent" decree.

By the decree, 152 judges would run in districts smaller than a county, while 22 would continue to be elected at-large. District boundaries would mirror state representative districts in Dallas, Harris, Bexar, and Jefferson counties. Justice of the peace districts would be used in Tarrant County. In Lubbock, Ector, and Midland counties, judges would run from the existing commissioners court districts. Anticipating the question of how the case can be settled without the agreement of the district court judges, the plan allows Judges Wood and Entz to be elected in a county-wide election. The stated purpose was to deny the defendant district judges standing to object.

Chief Justice Phillips, Judge Wood, and Judge Entz object to the proposed decree and oppose the motion to remand. In addition, three former Chief Justices of Texas, Joe R. Greenhill, Robert W. Calvert, and John L. Hill, are before us as *amici* objecting to remand--and denying the authority of the Attorney General to bind the State. Judges Wood and Entz have moved to realign General Morales with the plaintiffs, and allow their assumption of the defense

of the current system.[5] Judge Wood has also moved to disqualify the Texas Attorney General as counsel for the State. When settlement negotiations began, Chief Justice Phillips obtained independent counsel.[6] General Morales responded by moving to disqualify Phillips' counsel. Finally, immediately after oral argument, plaintiffs filed a notice of nonsuit of Chief Justice Phillips and the Texas Judicial Districts Board.

II. Motion to Remand

We are asked to remand to the district court for entry of a consent decree, although some of the parties wish to proceed with the appeal. The Attorney General argues that these non-consenting parties are no obstacle. Chief Justice Phillips, General Morales argues, was sued in his official capacity as chair of the Judicial Districts Board and the Attorney General is the exclusive lawyer for the State of Texas. On its face, this is not a remarkable contention. However, General Morales also maintains that in his role as lawyer for the State, he need not represent the State's policymakers; he can ignore them and impose his own views. That is remarkable. The force of this contention is that the Attorney General is the sole arbiter of State policy when the State's interest is in litigation. This argument is put forward despite the fact that it leaves his scrambling for legislative support wholly inexplicable; under his presently claimed power, the Attorney General did not need to have the "settlement" adopted by statute. In any event, Texas law does not sanction his actions. Nor are we persuaded that Defendant-Intervenors, Judges Entz and Wood, lack standing to object to a proposed consent decree that will allow them to run county-wide. We deny the motion to

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[5]Judge Wood also filed a motion to strike the Attorney General's Notice of Action Toward Settlement, which we denied before oral argument.

[6]We granted Chief Justice Phillips' motion requesting that he be allocated time at oral argument.

remand.

A. *The Authority of the Texas Attorney General*

General Morales is not the first Texas Attorney General to have staked such a claim of authority. We rejected a similar effort in *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (*en banc*). Baker challenged Texas' anti-sodomy statute, suing Holt, the Dallas City Attorney, and Wade, the Dallas County District Attorney. The district court certified a defendant class of officials responsible for enforcing the statute, with Holt and Wade as representatives, and the Attorney General of Texas intervened on behalf of the State. After the district court declared the statute unconstitutional, Danny E. Hill, Potter County's district attorney, filed a notice of appeal, concerned that the Attorney General might decide not to appeal. Hill was a member of the class, but was not a named defendant and had not sought to intervene. Hill's concern was realized when the Attorney General appealed but then withdrew the notice. After failing to persuade the Texas Supreme Court to order the Attorney General to pursue the appeal and unable to obtain leave to intervene from the district court, Hill asked this court for leave to intervene on appeal. We granted this request, explaining:

> [Hill] would be seriously prejudiced were he not allowed to intervene, whereas allowing the appeal to proceed would prejudice no one. As a state official empowered by Texas law to enforce criminal laws, his interest and its impairment by the district court's judgment cannot be questioned. . . .
>
> In this case where the district court has rejected binding Supreme Court authority, the circuit court is entitled to conclude as a matter of law that those interests were inadequately represented by those who failed to pursue the appeal and that the state officer seeking to intervene was a proper party to do so.

Id. at 292.

Attorney General Mattox made a considered decision

to accept the district court's declaration of unconstitutionality. That was a basic policy choice. *Baker*'s relevant instruction lies in the fact that Attorney General Mattox's decision did not control. *Baker* rejected the very power claimed by this Attorney General. The power he would exercise cannot be squared with *Baker*.

That Attorney General Mattox decided to accept the ruling of the district court and Morales reaches for a similar result by a "settlement" fails to distinguish our holding in *Baker*. It does not respond to our holding that the Attorney General cannot bind state officials, his clients, to his own policy preferences. It is asserted that Hill as a district attorney, one of hundreds in Texas, was charged with the duty of enforcing the statute held unconstitutional. The law enforcement responsibility of a district attorney and that of the Chief Justice as chair of the redistricting board, however, do not differ in relevant ways. Indeed, that the Chief Justice may defend the suit is an *a fortiori* case under *Baker*. After all, his judicial duties aside, the Chief Justice's enforcement responsibilities under the redistricting provisions of state law are statewide. A district attorney's duties, however, run only to the county line. *See Crane v. Texas*, 766 F.2d 193 (5th Cir. 1985).

The Texas Constitution requires the Chief Justice to supervise the state district courts. Article 5, § 7a established the Judicial Districts Board and made the Chief Justice its chair. Tex. Const. Art. 5, § 7a(a) and (b). The constitution charges the Board with the duty of reapportioning the judicial districts as the need arises. *Id.* § 7a(f). Among other things, the Board is required to consider a district's case load and population in its reapportionment decisions. Tex. Gov't Code Ann. § 24.945 (Vernon 1988). Of special importance to this case, the Board may not create districts smaller than a county without a general election. Tex. Const. Art. 5, § 7a(i); Tex. Gov't Code Ann. § 24.945(e) (Vernon 1988). A redistricting plan may not be proposed or adopted even in anticipation of such an election. *Id.* Indeed the district court denied leave to intervene in this suit to

Midland County concluding it was not a real party in interest. A panel of this court agreed, observing that, unlike the Judicial Districts Board, the county lacked "the power to re-shape judicial districts." *LULAC v. Clements*, 884 F.2d 185, 187 (5th Cir. 1989). Given the Chief Justice's role as chair of the Board and his state constitutional duties to manage state judicial districts and the efficiency of the courts, his contention that he has the authority to defend this lawsuit if the Attorney General will not is compelling. If a district attorney has a sufficient interest in protecting the laws he is duty-bound to enforce, we are persuaded that the Chief Justice as chairman of the Judicial Districts Board has a sufficient interest in protecting the current district court system.[7]

The concerns raised by the *Baker* dissent are not present here. The dissent was troubled by the fact that Hill was neither a named defendant nor a class representative, had never sought to intervene in the district court, and was not a named party when he filed his appeal. 769 F.2d at 294-95 (Rubin, J., dissenting). Here, Chief Justice Phillips has been a named defendant from the outset.

The state courts have had little occasion to face such a bold claim of authority. The few Texas cases that have grappled with the Attorney General's authority offer him little comfort. Morales points to *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991), but in *Terrazas*, General Morales also failed in an effort to "settle" a legislative reapportionment case. Following the 1990 census, plaintiffs sued various state and county officials to prevent the use of the new census in reapportioning the legislature, because it

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[7]The dissent argues that Chief Justice Phillips was joined solely as a jurisdictional party for Eleventh Amendment purposes. Even if that were true, and it is not, see *supra* page [11a], it would not answer the real question: if the State of Texas is the real party in interest, does the Attorney General possess exclusive authority to choose whether the State's interests will be asserted on appeal? In *Baker*, we answered in the negative.

allegedly undercounted minorities. The legislature proceeded with reapportionment and plaintiffs also challenged the resulting plans. General Morales defended the legislature's plans, lost at trial, and appealed directly to the Texas Supreme Court. Then, Morales agreed with the plaintiffs to settle the senate reapportionment challenge. The agreement included a redistricting plan that was submitted to the trial court and promptly accepted by it. Thereafter, five individuals, not parties to the suit, requested the Supreme Court of Texas to direct the trial court to vacate its judgments reconfiguring the senatorial districts, order the Attorney General to rescind the agreement, and direct the Secretary of State to withdraw submission of the plan for preclearance.

A plurality directed the trial court to vacate its judgments, but refused relief against the Attorney General. Four justices held that the trial court erred by failing to weigh all affected interests before entering the proposed decree. In Justice Hecht's words, "a district court cannot order a reapportionment plan for the State based on nothing more than an agreement of the Governor, the Attorney General, and a few citizens." *Id.* at 714.[8] Indeed a majority believed the Attorney General's "discretion includes the authority to *propose* a settlement agreement in an action attacking the constitutionality of a reapportionment statute." *Id.* at 722 (Hecht, J.) (emphasis supplied).

In approving of the Attorney General's conduct, however, the plurality noted that he acted "on behalf of the state defendants[,]" giving him the authority "*for his clients* and even on his own, to *suggest* possible remedies . . . [and] to negotiate a settlement." *Id.* (Hecht, J.) (emphasis added). "To hold that he did not would be to give him less authority than any party or *any other attorney participating in the case*." *Id.* (emphasis added). The Attorney General acts as counsel

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[8]Justice Gonzalez joined section II.A. of the plurality opinion regarding the entry of redistricting relief.

for state officials who are his clients.

Terrazas recognizes that the Attorney General represents officials. It does not follow that by doing so, the Attorney General steps into their shoes and assumes the policymaking roles of those officials, against whom specific relief is sought. We need not and do not decide the authority of the Attorney General when an official is named in his official capacity only to join the State. Plaintiff sought specific relief against the Judicial Districts Board chaired by defendant Chief Justice Phillips. The petitioners who objected to the settlement in *Terrazas* were not even parties to the suit. The Attorney General's power to settle for his clients is certainly no less than that of other lawyers, but *Terrazas* does not say that it is any greater. No lawyer may forge a settlement agreement over the express objection of his client. Here, to the extent that Morales represents the Chief Justice in the Justice's defense of his constitutionally assigned task, he may not ignore him. As Justice Wallace put it for the Texas Supreme Court in *Public Utility Commission of Texas v. Cofer*, 754 S.W.2d 121, 125 (Tex. 1988):

> We emphasize that when a statute confers a right upon the attorney general to represent an agency, it imposes a corollary duty, and the agency has every right to expect the same diligent and faithful representation as any other "client."

See also Hill v. Lower Colo. River Auth., 568 S.W.2d 473, 478 (Tex. Civ. App.--Austin 1978, writ ref'd n.r.e.) (rejecting an attempt by the attorney general to sue the Texas Water Rights Commission "in an effort to substitute his views for that of a lawfully constituted State administrative agency"); *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 729 (Tex. 1924) (although attorney general had authority to represent the State Superintendent of Education, he did not have authority "to elect for the state to accept or reject a contract for text-books that is voidable," a decision for the Board of Education).

The Texas legislature has also recognized that the Attorney General represents the State but does not make its policies. "An admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state." Tex. Gov't Code Ann. § 402.004 (Vernon 1988); *see also State v. Reagan County Purchasing Co.*, 186 S.W.2d 128, 135 (Tex. Civ. App.--El Paso 1944, writ ref'd w.o.m.) ("acts beyond the scope of [Attorney General's] delegated power are not binding on the State"). If the Texas Attorney General could make policy for the State, this provision would be superfluous, for he could never violate it. He would in effect be the State. When faced with this statute before, we appropriately noted that "Texas has been at particular pains to attempt to circumscribe the power of the attorney general to make admissions on its behalf." *United States v. Texas*, 680 F.2d 356, 368 n.17 (5th Cir. 1982).[9]

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[9]Because the office of Attorney General is rooted in the common law, many states, including Texas, refer to their Attorney General's common law powers. *E.g. Martinez v. State*, 753 S.W.2d 165, 179 (Tex. App.--Beaumont 1988, writ ref'd). Thus, there is some value to looking at how other states have dealt with the issue we face today. In *Tice v. Department of Transportation*, 312 S.E.2d 241, 246 (N.C. Ct. App. 1984), the North Carolina court held "that the Attorney General . . . is bound by the traditional rule governing the attorney-client relationship, and cannot enter a consent judgment without the consent of the entity represented." In Georgia, the Attorney General may not "bind his client by settlement for less than the full sum claimed, unless express authority be given by the client." *State v. Southwestern R.R.*, 66 Ga. 403, 407 (1881). The North Dakota Attorney General's power to represent state departments and officers

> does not mean that the attorney general, standing in the position of an attorney to a client, who happens to be an officer of the government, steps into the shoes of such client in wholly directing the defense and the legal steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or department concerned.

(continued...)

Stated another way, the Attorney General's right to represent state officials or state agencies cannot be gainsaid, *see Hill v. Texas Water Quality Bd.*, 568 S.W.2d 738, 741 (Tex. Civ. App.--Austin 1978, writ ref'd n.r.e.); *Morris v. Smiley*, 378 S.W.2d 149, 152 (Tex. Civ. App.--Austin 1964, writ ref'd n.r.e.), but he must in fact *represent* them. He cannot ignore his clients and bind the State against their wishes.[10] This is not to say that the Chief Justice is the sole arbiter. Both he and the Attorney General are named

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[9](...continued)
State ex rel. Amerland v. Hagan, 175 N.W. 372, 374 (N.D. 1919), *overruled on other grounds*, *Benson v. North Dakota Workmen's Compensation Bureau*, 283 N.W.2d 96 (N.D. 1979). According to the Mississippi Supreme Court,

> The unique position of the Attorney General requires that when his views differ from or he finds himself at odds with an agency, then he must allow the assigned counsel or a specially appointed counsel to represent the agency unfettered and uninfluenced by the Attorney General's personal opinion.

State ex rel. Allain v. Mississippi Public Serv. Comm'n, 418 So. 2d 779, 784 (Miss. 1982); *see also Frazier v. State by and through Pittman*, 504 So. 2d 675, 691 (Miss. 1987) (where attorney general refuses to represent state agency, agency is entitled to its own lawyer and court may retain jurisdiction and entertain the suit). Arizona does not permit its Attorney General to appeal a decision against the wishes of the state agency he represents. *Santa Rita Mining Co. v. Department of Property Valuation*, 530 P.2d 360 (Ariz. 1975). Finally, the authority of the Attorney General of Illinois does not permit him to waive the rights of his client. *Cook County v. Patka*, 405 N.E.2d 1376, 1380 (Ill. App. 1980).

[10]Professor Fiss has recognized the problem raised by Attorney General Morales' actions in this case. "We are left to wonder, for example, whether the attorney general should be able to bind all state officials, some of whom are elected and thus have an independent mandate from the people, or even whether the incumbent attorney general should be able to bind his successors." Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1079 (1984).

parties to this suit, and each has the right to be heard in this case. The Attorney General's authority does not allow him to "close either the mouth of [Phillips] or the ears of the courts, when there are complaints that the Attorney General or his assistants are not in fact fulfilling their duty." *Cofer*, 754 S.W.2d at 125.

B. *Other Motions*

We deny the Attorney General's motion to disqualify Phillips' counsel. We also deny plaintiffs' attempt to nonsuit the Texas Judicial Districts Board, including its chair, Chief Justice Phillips. The motion was filed immediately after oral arguments before the *en banc* court on May 24, 1993. Rule 41(a) governs voluntary dismissals and provides that a plaintiff may dismiss an action without order of the court in two circumstances. The plaintiff must either file the notice of dismissal before the adverse party serves its answer or summary judgment motion, whichever occurs first, or file a stipulation of dismissal signed by all parties who have appeared in the case. Fed.R.Civ.P. 41(a)(1). The notice of nonsuit comes almost five years after the defendants have answered, and none of the defendant-aligned parties has signed the motion. Plaintiffs have no unilateral right to dismiss the Chief Justice and Judicial Districts Board. We will not permit plaintiffs to seek injunctive relief against the office held by Chief Justice Phillips for almost five years and then dismiss him when he declines to settle. *See Davis v. Huskipower Outdoor Equipment Corp.*, 936 F.2d 193, 199 (5th Cir. 1991) (affirming refusal to dismiss defendant more than a year after the case was removed to federal court); *Radiant Technology Corp. v. Electrovert USA Corp.*, 122 F.R.D. 201 (N.D. Tex. 1988) (motion to voluntarily dismiss under Rule 41 should be denied when plaintiff seeks to circumvent an expected adverse result).

We deny the motion of the district judges as Defendant-Intervenors to realign General Morales with plaintiffs. Morales' efforts to settle the case do not require this measure. He is entitled to take a position in settlement negotiations that is different from his trial posture.

However, if the Attorney General changes his views on the merits of the case, realigning him with the plaintiffs may be appropriate. *Cf. Delchamps, Inc. v. Alabama State Milk Control Bd.*, 324 F. Supp. 117, 118 (M.D. Ala. 1971) (allowing Alabama Attorney General, who like the Texas Attorney General took an oath to defend both state and federal law, to realign himself with plaintiffs to challenge the federal constitutionality of a state law). We also deny Judge Wood's motion to disqualify General Morales as counsel for the State. While we have rejected his claimed power to bind against their will state officials he is charged to represent, he is nonetheless their counsel.

C. *The Intervenors*

The Attorney General may represent state officials in their official capacities, but there is no contention that General Morales represents Judges Wood and Entz.[11] They have intervened in their personal capacities and have elected to obtain their own counsel.[12] As we earlier

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[11]After trial, certain Bexar County district judges also sought to intervene as defendants, and we have before us an appeal from the denial of their motion. A motion to intervene under Rule 24 must be timely. Fed.R.Civ.P. 24(a), (b); *Jones v. Caddo Parish School Bd.*, 735 F.2d 923, 926 (5th Cir. 1984) (*en banc*). Although the district court did not expressly state that their motion was untimely, it was well within the district court's discretion to deny the motion on this ground.

[12]Because we find that the judges' standing in their individual capacities survives the settlement agreement, we are not required to address the ability of Texas district court judges to represent themselves in their official capacities. It appears, however, that Texas law permits them to do so. Tex. Gov't Code § 74.141, titled **Defense of Judges** provides:

> The attorney general shall defend a state *district judge*, a presiding judge of an administrative region, or an active, retired, or former judge assigned under this chapter in any action or suit in any court in which the judge *is a defendant*

(continued...)

observed, the proposed consent decree would allow Judge Wood and Judge Entz to continue to run county-wide. General Morales urges that they therefore lack standing to either prosecute the suit or object to the proposed decree.

To this point, the standing of the intervening parties has not been questioned. To the contrary, the intervenors played an important role at trial and have since taken the lead. After the federal district judge's ruling in favor of plaintiffs, the notice of appeal was first filed by Judges Wood and Entz, not by the Attorney General. Only the district judge's adherence to nonpartisan elections prodded the Attorney General to appeal. The Houston Lawyers' Association intervened by the same order as the intervening judges and carried the appeal from our first *en banc* decision to the United States Supreme Court.[13] Even now, no one questions the earlier uncontested standing of the intervenors; nor could they. Wood and Entz intervened in part to protect their tenure as elected judges. The district court found that they were illegally elected.

Of course, these intervenors must satisfy Article III to appeal on their own. *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *Didrickson v. United States Department of the Interior*, 982 F.2d 1332, 1337-39 (9th Cir. 1992); *United States v. Western Elec. Co.*, 900 F.2d 283 (D.C. Cir. 1990). A case or controversy between the State and plaintiffs remains. The parties have a right to a determination of that appeal, unless they consent to a remand. *See Wheeler v. American Home*

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[12](...continued)

> ***because of his office*** as judge *if* the judge requests the attorney general's assistance in the defense of the suit.

(emphasis added).

[13]"Since an intervenor is bound by future orders, it may appeal from an appealable order unless the intervention has been specifically limited to forbid it." *Matter of First Colonial Corp.*, 544 F.2d 1291, 1298 (5th Cir. 1977). There is obviously no such limitation on the intervenors' right to appeal in this case.

Products Corp., 582 F.2d 891, 896 (5th Cir. 1977) ("once intervention has been allowed, the original parties may not stipulate away the rights of the intervenor"); *see also Sheffield v. Itawamba County Bd. of Supervisors*, 439 F.2d 35, 36 (5th Cir. 1971) ("having instituted a public lawsuit to secure rectification for a constitutional wrong of wide dimension, [plaintiffs] cannot privately determine its destiny"). Put another way, the proposed settlement does not deprive this court of its jurisdiction to hear the appeal independently perfected by Judges Wood and Entz, an appeal from a decision that declared their elections illegal.

Even assuming the proposed settlement foreclosed the intervening judges' standing to protect their tenure, Wood and Entz would still have a sufficient stake in the litigation to satisfy the Constitution. In an earlier opinion in this case we said

> [a]sserting interests both *as a Texas voter* and as a sitting Texas district judge, Judge Sharolyn Wood moved to intervene on the side of the defendant--the state. The court allowed her to intervene in her personal capacity, permitting Dallas County District Judge Harold Entz to do so as well.

League of United Latin American Citizens v. Clements, 923 F.2d 365, 367 (5th Cir. 1991)(emphasis added). In the district court, Judge Entz moved to intervene as a defendant to defend on his interests as a judge, a lawyer, and a registered voter in and citizen of Dallas County. The court's order granting intervention in his individual capacity encompasses all of these interests.

Thus, the proponents of remand view the judges' intervention too narrowly, for Wood and Entz also have standing as voters. The settlement agreement would deprive voters of the right to vote for all judges with general jurisdiction over their county. The Eleventh Circuit recently confronted a similar situation. *Meek v. Metropolitan Dade County*, 985 F.2d 1471 (11th Cir. 1993), was a voting rights challenge to the at-large election of county commissioners in Dade County, Florida. As here, individual voters challenged

a liability finding that elected officials would not contest on appeal. Swann and Sampson were Dade County residents and voters. The district court denied them leave to intervene before trial. In a second request for leave to intervene, Swann and Sampson sought to preserve their right to appeal in the event of an adverse judgment and a decision by defendants not to appeal. The court found the at-large system illegal and, as feared, the County Commission decided not to appeal. When the district court denied their third motion to intervene, Swann and Sampson appealed.

Our sister court held that the district court abused its discretion in denying the intervention and affirmed the district court on the merits. The court held that the voters had standing, a sufficient interest both to intervene and carry the appeal when the state agency declined to do so. In its view, if the court were to deny standing to these voters, it "would be forced to conclude that most of the plaintiffs also lack standing, a conclusion foreclosed by the many cases in which individual voters have been permitted to challenge election practices." *Id.* at 1480 (citing *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Baker v. Carr*, 369 U.S. 186 (1962)). We agree that the standing of voters in a voting rights case cannot be gainsaid. *See also O'Hair v. White*, 675 F.2d 680, 688-90 (5th Cir. 1982) (*en banc*); *Henderson v. Fort Worth Independent School Dist.*, 526 F.2d 286, 288-90 (5th Cir. 1976).[14]

D. *Consent Decrees*

Even if all of the litigants were in accord, it does not follow that the federal court must do their bidding. The proposal is not to dismiss the lawsuit, but to employ the injunctive power of the federal court to achieve a result that the Attorney General and plaintiffs were not able to achieve

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[14]Our conclusion that Defendant-Intervenors continue to have standing in their individual capacities to defend the current method of electing trial judges makes it unnecessary for us to consider their motion to modify their intervention to enable them to do so.

through the political process. The entry of a consent decree is more than a matter of agreement among litigants. It is a "judicial act." *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). "[W]hen [the court] has rendered a consent judgment it has made an adjudication." *Kaspar Wire Works, Inc. v. Leco Eng'g & Machine, Inc.*, 575 F.2d 530, 538-39 (5th Cir. 1978) (quoting 1B James W. Moore et al., *Moore's Federal Practice* ¶ 0.409[5]). Courts must exercise equitable discretion before accepting litigants' invitation to perform the judicial act.

A consent decree must arise from the pleaded case and further the objectives of the law upon which the complaint is based. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525, 106 S. Ct. 3063, 3077 (1986). When presented with a proposed judgment, the court "must not merely sign on the line provided by the parties." *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir. 1981) (*en banc*) (Rubin, J.).

> Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its terms require more careful scrutiny. Even when it affects only the parties, the court should, therefore, examine it carefully to *ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence*. . . . If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.

Id. at 441 (Rubin, J.) (emphasis added); *see also Overton v. City of Austin*, 748 F.2d 941, 952-53 (5th Cir. 1984); *Williams v. City of New Orleans*, 729 F.2d 1554, 1559 (5th Cir. 1984) (*en banc*) (Williams, J.).

The emphasized passage makes a critical point. A proposed consent decree is generally--as here--a request for the court to exercise its equitable powers. It involves the court's sanction and power and is not a tool bending without

question to the litigants' will. As Justice Harlan wrote, "parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." *System Federation No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 651 (1961).[15]

We have recognized that when fewer than all litigants forge a consent decree, issues affecting other parties remain to be adjudicated. *City of Miami*, 664 F.2d at 440 (Rubin, J.). As eleven judges recognized in the same case, our preferences for settlement and accord are insufficient to justify the imposition of a decree that infringes upon the rights of third parties. *See id.* at 451 (Gee, J., concurring and dissenting). A consent decree "cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." *Local 93*, 478 U.S. at 529, 106 S. Ct. at 3079.

Courts must be especially cautious when parties seek to achieve by consent decree what they cannot achieve by their own authority. Consent is not enough when litigants seek to grant themselves powers they do not hold outside of court. *People Who Care v. Rockford Bd. of Educ.*, 961 F.2d 1335, 1337 (7th Cir. 1992). For example, a local government may not use a consent decree to avoid a state law requiring a referendum before the issuance of construction bonds. *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986).

We expressed our concern regarding the risks attending consent decrees in *Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984). In that case, plaintiffs and the city attorney, acting for the city council, proposed a decree substituting single-member council districts for the at-large council established by the city charter. A dissenting council member maintained that the council lacked the authority to change the existing scheme without a city-wide referendum.

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[15]In the same passage, *Wright* reminds us that "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." 364 U.S. at 651.

Id. at 947 n.5. In the district court, several black voters sought to intervene as *defendants* on the ground that subdistricting would curtail their voting power. *Id.* at 944. The plaintiffs petitioned for a writ of mandamus to compel the district court to implement the proposed decree without further consideration. We refused to issue the writ. In doing so, *Overton* recognized the danger of manipulation faced by federal courts. We may be asked to effectuate substantive results that government officials are not empowered to bring about themselves. *Id.* at 956. The risk can be realized in many ways, but is palpable where sharply divided state officials would draw the federal courts into a partisan political battle.

Our job is to decide a case or controversy. The parties' high-strung rhetoric does not fully obscure the reality that a live controversy yet exists. By declining to remand this case, we do not slow one whit any march for change in Texas. Its elected leaders are always free to pursue whatever scheme they think best, through the normal political process. Texas links the jurisdiction and electoral bases of its district judges and the still-contested question for this court is its legality.

The procedural posture of this case when the request to remand to the district court was heard is important. The issues in this case were well known to the entire court. The case had been fully tried and its appeal had twice been before a panel of this court and was before the *en banc* court a second time. The issues had been fully aired in the panel majority and dissenting opinion when this court vacated the panel opinion. In sum, we are asked to remand to the district court to consider entry of a "consent" decree and to decide whether it would "put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence." *City of Miami*, 664 F.2d at 441 (Rubin, J.). More precisely put, any federal decree must be a tailored remedial response to illegality. *Cf. Shaw v. Reno*, 113 S.Ct. 2816 (1993). We are asked to remand for this determination although we are not persuaded that there is

any illegality.

It is not a matter of our withholding announcement of our decision. We could not, in any event, remand without correcting the district court's misapprehensions of law, found even by our dissenting colleagues. Significant legal errors infected the trial court's earlier judgment, including its refusal to consider the effect of partisan voting, its finding of liability in Travis County now undefended, its selective aggregation of language and ethnic minorities, its refusal to accord weight to the State's linkage interest in the totality of the circumstances, and finally, its heavy reliance upon historical societal discrimination without bringing this history home to this case. We cannot escape this error-correcting task--and when it is done, there is no case. The amicus United States agrees with our conclusion that, once the proper legal standards are determined, the record presents no factual issue that needs revisiting. It follows that the proposed consent decree cannot respond to sufficiently identified illegality--because the record demonstrates that there is none.

E. *Chisom v. Edwards*

Finally, the parties urging remand point to *Chisom v. Edwards*, 970 F.2d 1408 (5th Cir. 1992), where we remanded a voting rights case for the district court to enter a consent decree. That case challenged the method of electing Louisiana's Supreme Court Justices. *Chisom v. Roemer*, 111 S. Ct. 2354, 2358 (1991). Our remand in *Chisom*, however, resulted from different circumstances.

First, all parties joined the motion to remand, as we were careful to point out in our order:

> The Joint Motion to Remand to Effectuate Settlement *filed by all parties* is hereby granted; and this case is remanded to the United States District Court for the Eastern District of Louisiana for the limited purpose of effectuating a settlement. Jurisdiction of the appeals is hereby retained. Upon notification that a consent judgment has been entered by the district court, the appeals will be

> dismissed. We express no opinion, of course, on the settlement or judgment.

Chisom, 970 F.2d at 1409 (emphasis added). As we have discussed, the same is not true here.[16]

Second, the parties in *Chisom* came to this court asking for remand carrying a duly enacted state law with them. They did not seek to invoke the preemptive force of the federal law. The decree in *Chisom* was agreed to by all parties and adopted into law by the state legislature. The consent decree did not set aside any state laws--and not by accident. It was carefully crafted to that end. In Louisiana, the legislature can create more supreme court districts with a two-thirds vote from both houses. La. Const. Art 5, § 4.[17] Article 5, § 3 of the Louisiana Constitution fixes the number of supreme court justices at seven and establishes that each shall serve a ten-year term.[18] Because the state wished to

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[16]For the same reason, Supreme Court authority does not require a remand. In *Turnock v. Ragsdale*, 493 U.S. 987 (1989), the Court granted the parties' joint motion to defer further proceedings for the parties to submit a proposed consent decree to the district court. Unlike the case before us, the joint motion in *Turnock* was a true joint motion; there were no objections. *See Ragsdale v. Turnock*, 941 F.2d 501, 503 (7th Cir. 1991) (recounting procedural history). In spite of its label, the Attorney General's motion is far from being a joint motion.

[17]Art. 5, § 4 provides:

> The state shall be divided into at least six supreme court districts, and at least one judge shall be elected from each. The districts and the number of judges assigned to each on the effective date of this constitution are retained, subject to change by law enacted by two-thirds of the elected members of each house of the legislature.

[18]Art. 5, § 3 provides:

> The supreme court shall be composed of a chief justice and six associate justices, four of whom must concur to render

(continued...)

create the Orleans district without upsetting the terms of the sitting justices, Louisiana had to temporarily expand the supreme court to eight members.[19]

While § 3 limits the size of the supreme court to seven justices, Art. 5, § 5(A) permits the Louisiana Supreme Court to "assign a sitting or retired judge to any court." La. Const. Art. 5, § 5(A). The legislature therefore created an additional place for a judge on the Court of Appeal for the Fourth Circuit, who, upon election, would be assigned to the supreme court to serve, in reality, as the eighth justice. *See* La. Rev. Stat. Ann. § 13:312.4 (West Supp. 1993). This temporary judgeship was to expire with a vacancy on the supreme court from the first district. The vacancy would be filled by an election in the newly created seventh district comprised of Orleans Parish. La. Rev. Stat. Ann. § 13:101.1 (West Supp. 1993). Both of these provisions were contained in Act 512 which, after receiving the required *two-thirds* vote in both houses of the legislature, became law on June 22, 1992. Official Journal of the Proceedings of the Senate of the State of Louisiana, 18th Reg. Sess. at 24 (June 18, 1992); Official Journal of the Proceedings of the House of the State of Louisiana, 18th Reg. Sess. at 31 (June 16, 1992). The Louisiana Legislature provided that Act 512 would not go into effect unless the federal court entered a consent decree in *Chisom*. La. Rev. Stat. Ann. § 13:101.1 (West Supp. 1993).

The Texas Legislature refused to take positive action, and the settlement agreement attempts to avoid constitutional requirements. The Texas Constitution

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[18](...continued)
judgment. The term of a supreme court judge shall be ten years.

[19]Louisiana's first effort to create an eighth position, and thereby resolve the *Chisom* litigation, came in 1989 in the form of a proposed constitutional amendment. However, the voters rejected the proposal. *See* La. Const. Art. 5, §§ 4, 35, Historical Notes.

requires that judges be elected from districts no smaller than a county, absent a majority vote by the citizens of that county. Tex. Const. Art. 5, §§ 7, 7a(i).[20] The settlement agreement is not contingent on approval by the voters of each county. The legislature has not proposed a constitutional amendment. It has made no laws.

F. *Federalism*

Then we have all sides claiming the high ground of federalism. Some of the assertions are creative. The suggestion that state political groups, unable to muster sufficient political force to change the system, can by "agreement" enlist the preemptive power of the federal court to achieve the same end stands federalism on its head. Of course, we defer to legislative will and state decision. Here, the "decision" to which we are asked to defer is a decision by a political faction that the federal court should order the state to change its system. We do not share this curious view of federalism.

III. Racial Bloc Voting

As amended, § 2 of the Voting Rights Act prohibits states from imposing or applying any "standard, practice, or

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[20]Art. 5, § 7 provides:

> The state shall be divided into judicial districts, with each district having one or more judges as may be provided by law or by this Constitution. . . .

Art. 5, § 7a(i) provides:

> The legislature, the Judicial Districts Board, or the Legislative Redistricting Board may not redistrict the judicial districts to provide for any judicial district smaller in size than an entire county except as provided by this section. Judicial districts smaller in size than the entire county may be created subsequent to a general election where a majority of the persons voting on the proposition adopt the proposition "to allow the division of ____ County into judicial districts composed of parts of ____ County." No redistricting plan may be proposed or adopted by the legislature, the Judicial Districts board, or the Legislative Redistricting Board in anticipation of a future action by the voters of any county.

procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." A minority group may establish a violation of this provision by proving "that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[21] Congress intended "to make clear that proof of discriminatory intent is not required to establish a violation of Section 2" by "restor[ing] the legal standards" which prevailed in constitutional voting discrimination cases prior to *Mobile v. Bolden*, 446 U.S. 55 (1980). S. Rep. 417 at 2, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206. Specifically, the 1982 amendments "codify" the "results test" articulated in *White v. Regester*, 412 U.S. 755 (1973). *Id.*

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[21] Section 2 reads in full:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

Section 2 claims brought against multimember schemes are governed by the framework established in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Under *Gingles*, plaintiffs challenging an at-large system on behalf of a protected class of citizens must demonstrate that (1) the group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) it is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Growe v. Emison*, 113 S.Ct. 1075, 1084 (1993); *Gingles*, 478 U.S. at 50-51. Satisfaction of these three "preconditions," *Voinovich v. Quilter*, 113 S.Ct. 1149, 1157 (1993), is necessary, *Gingles*, 478 U.S. at 50, but not sufficient to establish liability under § 2. *Chisom v. Roemer*, 111 S.Ct. 2354, 2365 (1991); *Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1116 (5th Cir. 1991) (*Westwego III*). Plaintiffs must also show that, under the "totality of circumstances," they do not possess the same opportunities to participate in the political process and elect representatives of their choice enjoyed by other voters. Courts are guided in this second inquiry by the so-called *Zimmer* factors listed in the Senate Report.[22]

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[22]The Senate Report indicates that "[t]ypical factors include":

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to

(continued...)

A central issue here, one that divided the panel and one over which the parties vigorously disagree, concerns *Gingles*' white bloc voting inquiry and the closely related *Zimmer* factor directing courts to examine "the extent to which voting . . . is racially polarized." S. Rep. 417 at 29, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206. As the Court in *Gingles* held, the question here is not whether white residents tend to vote as a bloc, but whether such bloc voting is "legally significant." *Gingles*, 478 U.S. at 55; *Salas v. Southwest Texas Jr. College Dist.*, 964 F.2d 1542, 1553 (5th Cir. 1992). In finding a violation of § 2 in each of the nine challenged counties, the district court held that plaintiffs need only demonstrate that whites and blacks

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[22](...continued)

that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. 417 at 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206-07. These factors are derived from our decision in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), as well as *White*. *See* S. Rep. 417 at 28 n.113, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206 n.113.

generally support different candidates to establish legally significant white bloc voting. Because "it is the difference between choices made by blacks and whites *alone* . . . that is the central inquiry of § 2," the court excluded evidence tending to prove that these divergent voting patterns were attributable to factors other than race as "irrelevant" and "legally [in]competent."

On appeal, defendants contend that the district court erred in refusing to consider the nonracial causes of voting preferences they offered at trial. Unless the tendency among minorities and whites to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race, defendants argue, plaintiffs' attempt to establish legally significant white bloc voting, and thus their vote dilution claim under § 2, must fail. When the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens in the contested counties, defendants conclude, the district court's judgment must be reversed.

We agree. The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters "on account of race or color." Without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense "discriminatory," and any distinction between deprivation and mere losses at the polls becomes untenable. In holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat. In so doing, the district court ignored controlling authorities: *Whitcomb v. Chavis*, 403 U.S. 124 (1971), which established a clean divide between actionable vote dilution and "political defeat at the polls"; the 1982 amendments, enacted to restore a remedy in cases "where a combination of public activity and *private discrimination* have joined to make it virtually impossible for

minorities to play a meaningful role in the electoral process," *Hearings on the Voting Rights Act Before the Subcomm. on the Constitution of the Senate Comm. of the Judiciary*, 97th Cong., 2d Sess. 1367-68 (statement of Prof. Drew Days) (emphasis added); and *Thornburg v. Gingles*, 478 U.S. 30 (1986), where a majority of the Justices rejected the very test employed by the district court as a standard crafted to shield political minorities from the vicissitudes of "interest-group politics rather than a rule hedging against racial discrimination." *Id.* at 83 (White, J., concurring); *id.* at 101 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring). We must correct these errors.

A. *Whitcomb v. Chavis and White v. Regester*

The Senate Report indicates that the 1982 amendments to § 2 were intended to "codify" the results test as employed in *White* and *Whitcomb*. *See* S. Rep. 417 at 2, 20-23, 32-33, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 197-201, 210-11; *Gingles*, 478 U.S. at 97 (O'Connor, J., concurring) ("In enacting § 2, Congress codified the 'results' test this Court had employed, as an interpretation of the Fourteenth Amendment, in *White* and *Whitcomb*"); *Jones v. City of Lubbock*, 727 F.2d 364, 379 (5th Cir. 1984) (the amended § 2 "codifies pre-*Bolden* voting dilution law"). Consequently, "it is to *Whitcomb* and *White* that we should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of § 2." *Gingles*, 478 U.S. at 97 (O'Connor, J., concurring).

In *Whitcomb*, black citizens residing in one part of Marion County, referred to as the "ghetto" by the Court, claimed that the county's at-large method of electing members to the state legislature unconstitutionally diluted their votes. The "[s]trong differences" between "ghetto" residents and adjacent communities "in terms of housing conditions, income and educational levels, rates of unemployment, juvenile crime, and welfare assistance," 403

U.S. at 132,[23] correlated closely with voting patterns in the county. "Ghetto" residents "voted heavily Democratic," but since the county's more affluent white majority consistently voted Republican, black-preferred candidates were defeated in four of the five elections between 1960 and 1968. *Id.* at 150. The *Whitcomb* Court recognized that the at-large electoral scheme caused the "voting power of ghetto residents [to be] 'cancelled out,'" *id.* at 153, but held that this result by itself did not provide grounds for relief. Noting that blacks enjoyed full access to the political process,[24] the Court reasoned that "had the Democrats won all of the elections or even most of them, the ghetto would have no justifiable complaints about representation." *Id.* at 152. For this reason, the Court concluded that the "failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes." *Id.* at 153.

The *Whitcomb* Court was reluctant to view the plaintiffs' claims of vote dilution as anything more than "a euphemism for political defeat at the polls," *id.*, for, absent evidence of a lack of access to the political system, there was no principle by which the Court could distinguish the

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[23]*See also Chavis v. Whitcomb*, 305 F. Supp. 1364, 1376-81 (S.D. Ind. 1969).

[24]The Court stated:

> We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.

Id. at 149-50.

"ghetto's" claims and those of other unsuccessful political groups:

> [A]re poor Negroes of the ghetto any more under-represented than poor ghetto whites who also voted Democratic and lost, or any more discriminated against than other interest groups or voters in Marion County with allegiance to the Democratic Party, or, conversely, any less represented than Republican areas or voters in years of Republican defeat? We think not. The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system.

Id. at 154-55. To grant relief to black residents in this case, the Court held, "would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a multimember district vote." *Id.* at 156.

The Court's assertion that plaintiffs' racial vote dilution claim was indistinguishable from complaints which might be brought by any unsuccessful interest group hinged on its determination that "ghetto" residents did not suffer from a lack of access to the political process. Despite the presence of vast disparities in virtually every significant measure of socioeconomic status, the Court found that black voters stood on the same footing with whites in vying for representation within Marion County. "Ghetto" residents had in fact experienced a string of losses at the polls in recent years, but these defeats were shared equally among all members of the Democratic Party.

The Court confronted very different circumstances

two years later in *White v. Regester*, 412 U.S. 755 (1973). The Court confirmed *Whitcomb*'s rejection of the claim that "every racial or political group has a constitutional right to be represented in the state legislature," *id.* at 769, and reiterated the standard established in its earlier decision: a minority group must prove "that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 766 (citing *Whitcomb*, 403 U.S. at 149-50). Unlike the plaintiffs in *Whitcomb*, however, the black residents of Dallas County and the Hispanic voters in Bexar County each established that they had been effectively excluded from the political processes leading to the nomination and election of the Texas House of Representatives. 412 U.S. at 766-70.

Specifically, black voters in Dallas labored under the yoke of Texas' long history of official discrimination and were subjected to several procedural devices which, while not invidious in themselves, "enhanced the opportunity for racial discrimination." *Id.* at 766. "More fundamentally," the Court noted, the Dallas Committee for Responsible Government, "a white-dominated organization that is in effective control of Democratic Party candidate slating," had slated only two black candidates in its history, who, not coincidentally, constituted the only two blacks ever to have served in the Dallas County delegation to the Texas House since Reconstruction. *Id.* at 766-67. The DCRG failed to display any "good-faith concern for the political and other needs and aspirations of the Negro community," and in fact regularly relied on racial campaign tactics to defeat candidates supported by black residents. *Id.* at 767. Consequently, the Court had no reason to disturb the district court's conclusion "that 'the black community has been effectively excluded from participation in the Democratic primary selection process,' and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner." *Id.* (quoting *Graves v. Barnes*, 343 F. Supp. 704, 726 (W.D. Tex. 1972)).

The Court also upheld a similar finding that Mexican-Americans likewise had been "'effectively removed from the political processes of Bexar [County] in violation of all the *Whitcomb* standards.'" *Id.* at 769 (quoting *Graves*, 343 F. Supp. at 733). Like black residents of Texas, Mexican-Americans "had long 'suffered from, and continue[d] to suffer from, the results and effects of invidious discrimination and treatment in the field of education, employment, economics, health, politics and others.'" *Id.* at 768 (quoting *Graves*, 343 F. Supp. at 728)). In addition, the district court determined that "cultural and language barrier[s] . . . 'conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.'" *Id.* (quoting *Graves*, 343 F. Supp. at 731). The exclusionary effects of past and present discrimination, the Court found, were palpably reflected in low voting registration among Mexican-Americans, the election of only five Bexar County Mexican-Americans to the Texas Legislature since 1880, and the county delegation's unresponsiveness to the community's interests. *Id.* at 768-69. Given that the district court's findings flowed from "a blend of history and an intensely local appraisal" of conditions in Bexar County, the Court was "not inclined to overturn" its conclusion that the multimember district "invidiously excluded Mexican-Americans from effective participation in political life." *Id.* at 769. As we will explain, this earlier time in Texas history and the elections at issue here present stark contrasts. The record before us contains no evidence that past or present discrimination has affected minorities' political access in any way.

The principles announced and applied in *Whitcomb* and *White* are instructive and, we believe, controlling. As Justice White, the author of these opinions, recently indicated, the central "theme" of *Whitcomb* and *White* is "that it is not mere suffering at the polls but discrimination in the

polity with which the Constitution is concerned." *Shaw v. Reno*, 113 S.Ct. 2816, 2835 (1993) (White, J., dissenting). Beyond the bounds of this litigation, the clarity with which the *Whitcomb* Court articulated the principles underlying the "results" test has largely forestalled confusion or doubt, even among those whom plaintiffs might be inclined to count as allies. *See, e.g., Jones v. City of Lubbock*, 727 F.2d 364, 384 (5th Cir. 1984) ("Even where an at-large system interacts with a racially or ethnically polarized electorate to the disadvantage of the minority, the 'result' is not necessarily a denial of political access . . . . [T]he 'result' in *Whitcomb* [is] that polarized voting does not render an at-large system dilutive of minority voting strength"); Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 Va. L. Rev. 1, 22 n.78 (1991). Justice Marshall, for example, provided a clear explanation of the Court's holding in his dissent in *Mobile v. Bolden*, 446 U.S. 55 (1980):

> In *Whitcomb v. Chavis*, we again repeated and applied the *Fortson* [effects] standard, but determined that the Negro community's lack of success at the polls was the result of partisan politics, not racial vote dilution. The Court stressed that both the Democratic and Republican Parties had nominated Negroes and several had been elected. Negro candidates lost only when their entire party slate went down to defeat. In addition, the Court was impressed that there was no finding that officials had been unresponsive to Negro concerns.

Id. at 109 (Marshall, J., dissenting) (citations omitted).

Justice Marshall's references to the "lack of success at the polls" as a "result" of "partisan politics, not racial vote dilution," closely tracks the relevant language in *Whitcomb*, where the Court held that the "cancell[ing] out" of the "voting power of ghetto residents" was more "a function of losing elections" or "political defeat" than of "built-in bias against poor Negroes." 403 U.S. at 153. Absent evidence that minorities have been excluded from the political

process, a "lack of success at the polls" is not sufficient to trigger judicial intervention. Courts must undertake the additional inquiry into the reasons for, or causes of, these electoral losses in order to determine whether they were the product of "partisan politics" *or* "racial vote dilution," "political defeat" *or* "built-in bias." It is only upon concluding that a minority group's failure to prevail at the polls, that is, their failure to attract the support of white voters, was the "result" or "function" of "racial vote dilution" or "built-in bias," that a court may find that minority plaintiffs have suffered "a denial or abridgement of the right . . . to vote on account of race or color." In sum, *Whitcomb* unmistakably prescribes the very inquiry into the causes underlying the lack of support for minority-preferred candidates among white voters with which the district court dispensed.

As Justice Marshall suggested, failures of a minority group to elect representatives of its choice that are attributable to "partisan politics" provide no grounds for relief. Section 2 is "a balm for racial minorities, not political ones--even though the two often coincide." *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (citing *Whitcomb*). "The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates." *Id.* Rather, § 2 is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats. While this rule is easier stated than applied, the *Whitcomb* Court's application of the "results" test to the facts before it provides helpful and indeed dispositive guidance. As we explain in greater detail below, the Court's dismissal in *Whitcomb* of the plaintiffs' vote dilution claim as a "mere euphemism for political defeat at the polls," despite evidence of polarized voting, the lingering effects of past discrimination, and little electoral success among minority candidates, precludes finding a violation of § 2 in most, but not all, of the counties at issue.

B. *The 1982 Amendments*

The Senate Report accompanying the 1982 amendments to § 2 states that Congress intended to "codify" the "results test" articulated and employed in *Whitcomb* and *White*. Congress of course retained the statutory language restricting relief under § 2 to "denial[s] or abridgment[s] of the right . . . to vote on account of race or color." This limitation was not so much the product of legislative discretion as constitutional imperative, given that the scope of Congress' remedial power under the Civil War Amendments is defined in large part by the wrongs they prohibit. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 206 (1980) (Rehnquist, J., dissenting); *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part). Thus, the Senate Report explained that the 1982 amendments avoided constitutional difficulty because "the very terms and operation of [§ 2] confine its application to actual racial discrimination." S.Rep. 417 at 43, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 221.

Congress embraced *Whitcomb* on terms consistent with § 2's limitation to cases of "actual racial discrimination." Noting that the claim before the Court in *Whitcomb* alleged vote dilution on grounds that "black ghetto residents with [distinct] legislative interests had been consistently underrepresented in the legislature," the Senate Report recounted what it regarded as the relevant facts of the case:

> The evidence showed that the ghetto area voted Democratic, that the Republicans won four of the five elections from 1960 to 1968, and that in 1964, when the Democrats won, ghetto area senators and representatives were elected. Nine blacks had in fact been elected to the legislature from the at-large districts between [1960] and 1968.

Id. at 20-21, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 198. The facts cited by the Senate mirror those previously identified by Justice Marshall in *Bolden* and stressed here: Plaintiffs were unsuccessful in years in which

their party suffered electoral defeat; they were able to elect representatives of their choice when their party prevailed. Not surprisingly, the Senate adopted *Whitcomb*'s central teaching in presenting what it understood to be the kernel of the decision:

> The failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been "cancelled out," as the district court held, but this seems a mere euphemism for political defeat at the polls.

Id. at 21 (quoting *Whitcomb*, 403 U.S. at 153), *reprinted in* 1982 U.S. Code Cong. & Admin. News at 198.

In keeping with *Whitcomb*'s sharp distinction between "built-in bias" and "political defeat at the polls," the Senate Report indicated that a proper application of the results test requires courts to "distinguish[] between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not." *Id.* at 33, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 211. The Senate Report, again following *Whitcomb*, accorded this inquiry into "racial bloc voting," that is, whether "'race is the predominant determinant of political preference,'" dispositive significance: Absent a showing of "racial bloc voting," the Senate Report asserted, "it would be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process under the results test." *Id.* (quoting S.Rep. 417 at 148 (Report of the Subcommittee on the Constitution)), *reprinted in* 1982 U.S. Code Cong. & Admin. News at 321). Since the results test itself, contrary to critics' charges, "*makes no assumptions one way or the other* about the role of racial political considerations in a particular community," *id.* at 34, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 212, the Senate Report emphasized that plaintiffs must supply affirmative proof of "racial bloc voting." The "mere existence of underrepresentation plus a history of dual schools" plainly

does not suffice to make out a violation of § 2. *Id.*

It is difficult to see how the record in this case could possibly support a finding of liability under the approach outlined in the Senate Report. Plaintiffs have not even attempted to establish proof of racial bloc voting by demonstrating that "race," not, as defendants contend, partisan affiliation, "is the predominant determinant of political preference." They have instead maintained, in the very teeth of the Senate Report, that such a showing is unnecessary. Because the district court accepted this argument, the test employed at trial enabled plaintiffs to prevail by proving little more than a lack of success at the polls and a history of discrimination. While this standard finds clear support in Justice Brennan's plurality opinion in *Thornburg v. Gingles*, 478 U.S. 30 (1986), it "simply was not the approach used by the courts under the *White/Zimmer* test" and codified by Congress. S. Rep. 417 at 34, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 212.

C. *Thornburg v. Gingles*

Justice Brennan's discussion of the first and second *Gingles* factors received majority support. *Gingles*, 478 U.S. at 50-51, 56.[25] With respect to the third element, however, five justices rejected Justice Brennan's proposed standard for proving racial bloc voting. *Id.* at 83 (White, J., concurring); *id.* at 100-01 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring). For this reason, we believe that it is to these opinions, not Justice Brennan's, that we should look in attempting to define the contours of the inquiry into legally significant bloc voting.

Despite the presence of express language to the

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[25]In order to make out a § 2 vote dilution claim under *Gingles*, minority plaintiffs challenging an at-large system must prove that: (1) the group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) it is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Gingles*, 478 U.S. at 50-51.

contrary in the Senate Report, see S. Rep. 417 at 33 ("racial bloc voting" is established when "race is the predominant determinant of political preference"), *reprinted in* 1982 U.S. Code Cong. & Admin. News at 211, Justice Brennan held that racial bloc voting or "racially polarized voting" did not describe divergent "voting patterns for which the *principal cause* is race." *Gingles*, 478 U.S. at 61. Instead, he asserted that "[i]t is the *difference* between the choices made by blacks and whites--not the reasons for that difference--that [matters]." *Id.* A consideration of "irrelevant variables" such as partisan affiliation or the race of the candidate, Justice Brennan urged, would "distort[] the equation and yield[] results that are indisputably incorrect under § 2 and the Senate Report." *Id.* at 64.

Justice Brennan's assertion that racial political considerations had no role in examining racial bloc voting was squarely rejected by five Justices in *Gingles*. 478 U.S. at 83 (White, J., concurring); *id.* at 100-01 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring). Justice White argued that

> Justice Brennan states in Part III-C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. *Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree.* Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under Justice Brennan's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominately black areas vote Democratic . . . . *This is interest-group politics rather than a rule hedging*

> *against racial discrimination*. I doubt that this is what Congress had in mind in amending § 2 as it did, and it seems quite at odds with the discussion in *Whitcomb v. Chavis*, 403 U.S. 124, 149-160 (1971).

Id. at 83 (White, J., concurring) (emphasis added). Justice O'Connor joined Justice White in maintaining that evidence that white and minority voters generally supported different candidates did not constitute legally significant racial bloc voting where these patterns were attributable to partisan affiliation rather than the race of the candidate. She therefore rejected Justice Brennan's position that

> evidence that the divergent racial voting patterns may be explained in part *by causes other than race, such as an underlying divergence in the interests of minority and white voters* . . . . can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether *bloc voting by white voters will consistently defeat minority candidates*. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.
>
> I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge. Indeed, the Senate Report clearly stated that one factor that

> could have probative value in § 2 cases was "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S. Rep., at 29. The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on "intensive racial politics," on "racial political considerations," and on whether "racial politics . . . dominate the electoral process" as one aspect of the "*racial bloc voting*" that Congress deemed relevant to showing a § 2 violation. *Id.*, at 33-34. *Similarly, I agree with Justice White that Justice Brennan's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with Whitcomb* and is not necessary to the disposition of this case. *Ante*, at 83 (concurring).

Id. at 100-01 (O'Connor, J., concurring) (emphasis added).

As courts and commentators alike have noted, Justice White and Justice O'Connor were united in their fidelity to *Whitcomb*'s distinction between vote dilution and partisan politics and in their opposition to Justice Brennan's attempt to expunge this teaching from the bloc voting inquiry. *See, e.g., Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) ("Justice White . . . observ[ed] that system leading to the election of black Republicans could not be dismissed as discriminatory. To disregard the race of the victors, Justice White concluded, 'is interest-group politics rather than a rule hedging against racial discrimination.' Justice O'Connor agreed") (citation omitted); Note, *Voting Rights Act Section 2: Racially Polarized Voting and the Minority Community's Representative of Choice*, 89 Mich. L. Rev. 1038, 1044 (1991); Note, *Defining the Minority Preferred Candidate Under Section 2*, 99 Yale L.J. 1651, 1662-63 (1990). The division in *Gingles* between the

Brennan plurality and the five Justices who supported the White/O'Connor approach cuts deep, reflecting quite different visions of voting rights and their statutory treatment. Since these five Justices expressly rejected a test that would permit § 2 liability to attach upon a showing that white and black citizens generally gave their votes to different candidates in favor of an inquiry into the possible explanations of these divergent voting patterns, we believe that it is this view, not Justice Brennan's, that commands our allegiance. The district court's failure to accord similar weight to this approach was not justified.

All members of the Court in *Gingles* agreed that only "legally significant" racial bloc voting is cognizable under § 2. They disagreed sharply, however, on the sort of proof that would implicate this provision. Justice Brennan held that a "minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. Justice O'Connor, on the other hand, argued that such a showing did not warrant judicial intervention: "[A] reviewing court should be required to find more than simply that the minority group does not usually attain an undiluted measure of electoral success." *Id.* at 99 (O'Connor, J., concurring). Instead, she would require a court to "find that even substantial minority success will be highly infrequent under the challenged plan before it may conclude, on this basis alone, that the plan operates to 'cancel out or minimize the voting strength of [the] racial grou[p].'" *Id.* at 99-100 (quoting *White*, 412 U.S. at 765) (alterations in original).

Justice O'Connor's admonition that federal courts should stay their hand absent proof that "even substantial minority success will be highly infrequent" receives formal expression in her insistence that the racial bloc voting inquiry must include an examination of the causes underlying divergent voting patterns. Both Justice Brennan and Justice O'Connor recognized that racial bloc voting is intimately related to the responsiveness of elected officials

to the interests of minorities, one of the factors considered as part of the "totality of circumstances." As Justice Brennan indicated, "[n]ot only does '[v]oting along racial lines' deprive minority voters of their preferred representatives in these circumstances, it also 'allows those elected to ignore [minority] interests without fear of political consequences.'" *Id.* at 48 n.14 (quoting *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (alterations in original)). The close tie between bloc voting and representatives' responsiveness noted by the Court in *Rogers* and confirmed by Justice Brennan rests on common sense: Public officials need not address concerns expressed by minorities so long as white bloc voting ensures that they will remain *minority* concerns. The Court in *Rogers* and Justice Brennan, however, differed sharply over the sort of polarized voting that might provide elected officials with such assurances and federal courts with grounds to intervene. The Court in *Rogers* held that this close identification was warranted only where racial political considerations were present, that is, where white bloc voting caused "minority candidates [to] lose elections *solely because of their race*." *Rogers*, 458 U.S. at 623 (emphasis added). Justice Brennan's approach, by contrast, assumes that political leaders may safely ignore minority concerns even where black and white voters are separated only by differing interests. Put another way, Justice Brennan's bloc voting test accords governing majorities linked only by the perception of common interests the same permanence and thus relevance under § 2 as white blocs cemented by racial prejudice.

Justice O'Connor not only rejected Justice Brennan's polarized voting standard but was also unwilling to join in the questionable assumption that minorities are unable to influence elections and secure the attention of public officials where these groups have been unsuccessful in their efforts to elect their preferred representatives. *Gingles*, 478 U.S. at 100-101 (O'Connor, J., concurring). Unlike Justice Brennan, she argued that "Congress also intended that explanations of the reasons why white voters rejected

minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account." *Id.* at 100 (O'Connor, J., concurring). Following *Rogers*, Justice O'Connor believed that a minority group's prospects for future electoral success and the likelihood that elected officials will take account of their interests differ materially "in a community where racial animosity is absent although the interests of racial groups diverge." *Id.* (O'Connor, J., concurring). A tendency among whites to cast their votes on the basis of race presents a far more durable obstacle to the coalition-building upon which minority electoral success depends than disagreements over ideology for, as Professor Ely observes, "prejudice blinds us to overlapping interests that in fact exist." John Hart Ely, *Democracy and Distrust* 153 (1980). Representatives who owe their office to the support of majorities bound by prejudice need not attend to the interests of minorities, since the bias uniting their constituents ensures that these issues will remain minority concerns. Where, on the other hand, voting patterns correlate with partisan affiliation or perceived interest, the open channels of communication facilitate a recognition of points of common ground that might otherwise go undetected. Elected officials in these communities cannot ignore minority interests because this group might be part of the winning coalition that votes them out of office. The deep division between Justice Brennan and Justice O'Connor on the question of racial bloc voting thus reflects fundamentally different views of political factions and our constitutional and statutory arrangements for accommodating their simultaneous demands for fluidity and fixity.[26]

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[26]The dissent contends that we have departed from controlling Supreme Court precedent in requiring plaintiffs to show more than divergent voting patterns among white and minority voters in order

(continued...)

Given that the divergent voting patterns in this case are in most instances attributable to partisan affiliation rather than race, it is thus far from coincidental that the district court found *no evidence* of unresponsiveness on the part of elected officials in any of the contested counties. The irony, of course, is that the subdistricting remedy sought by plaintiffs provides most judges with the same opportunity to ignore minority voters' interests without fear of political

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[26](...continued)
to establish legally significant bloc voting. The dissent properly points out that a majority of the Court in *Gingles* held that racial bloc voting rests on proof that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. As the Court's recent unanimous decision in *Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993), indicates, this standard is hardly controversial. The Justices in *Gingles*, however, were sharply divided on the crucial, separate issue of the sort of showing necessary to establish "legally significant" bloc voting--that is, the conditions that enable courts to predict that a majority bloc will consistently "defeat the minority's preferred candidate." The dissent correctly concludes that the approach taken by Justice White and Justice O'Connor, rather than that offered by Justice Brennan, should govern this second inquiry. Thus, we are in full agreement with the dissent that the possible causes of polarized voting must be examined because "they call into question the consistency with which the white bloc will oppose minority-preferred candidates." Dissent at [159].

As we state in the text, we regard evidence that divergent voting patterns are attributable to partisan affiliation or perceived interests rather than race as quite probative on the question of a minority group's future success at the polls. The dissent, however, while apparently willing to consider other possible non-racial causes, asserts that partisan affiliation is insignificant. We are told, in fact, that "the Voting Rights Act, as interpreted in *Gingles* and succeeding cases, *presupposes* partisan voting." Dissent at [155]. This refusal to distinguish racial politics from partisan politics strikes us as utterly inconsistent with the unbroken line of authority extending from *Whitcomb* and *White* through Justice Marshall's dissent in *Bolden* and the 1982 amendments to the controlling concurring opinions in *Gingles* the dissent purports to embrace.

reprisal they would possess if elections were in fact dominated by racial bloc voting.

D. *Partisan Politics*

We need not hold that plaintiffs must supply conclusive proof that a minority group's failure to elect representatives of its choice is caused by racial animus in the white electorate in order to decide that the district court's judgment must be reversed. It is true that such a requirement could be inferred from the text of § 2 (prohibiting "denial[s] or abridgement[s] of the right . . . to vote on account of race or color"); the caselaw Congress intended to codify in amending the provision, see, e.g., *Whitcomb*, 403 U.S. at 153 (vote dilution does not lie when losses at the polls do not reflect "built-in bias against poor Negroes"); the Senate Report, see S. Rep. 417 at 33 (equating proof of racial bloc voting with evidence that "race is the predominant determinant of political preference"), *reprinted in* 1982 U.S. Code Cong. & Admin. News at 211; the testimony of prominent supporters of the Act, see, e.g., *Hearings on the Voting Rights Act Before the Subcomm. on the Constitution of the Senate Comm. of the Judiciary*, 97th Cong., 2d Sess. 1367-68 (statement of Prof. Drew Days) (§ 2 implicated "where a combination of public activity and private discrimination have joined to make it virtually impossible for minorities to play a meaningful role in the electoral process"); and the controlling opinions of the Supreme Court. *See Gingles*, 478 U.S. at 100 (O'Connor, J., concurring) (distinguishing communities where polarized voting is attributable to "racial hostility" and those in which "racial animosity is absent although the interests of racial groups diverge"). There is also a powerful argument supporting a rule that plaintiffs to establish legally significant racial bloc voting must prove that their failure to elect representatives of their choice cannot be characterized as a "mere euphemism for political defeat at the polls," *Whitcomb*, 403 U.S. at 153, or the "result" of "partisan politics." *Bolden*, 446 U.S. at 100 (Marshall, J., dissenting).

Describing plaintiffs' burden in terms of negating

"partisan politics" rather than affirmatively proving "racial animus" would not be simply a matter of nomenclature. As Judge Wood emphasizes, there are many other possible non-racial causes of voter behavior beyond partisan affiliation. A rule conditioning relief under § 2 upon proof of the existence of racial animus in the electorate would require plaintiffs to establish the absence of not only partisan voting, but also all other potentially innocent explanations for white voters' rejection of minority-preferred candidates. Factors that might legitimately lead white voters to withhold support from particular minority candidates include, for example, limited campaign funds, inexperience, or a reputation besmirched by scandal. Because these additional factors map only imperfectly onto partisan affiliation, detailed multivariate analysis might then be the evidence of choice. The argument would then be that without this additional inquiry, courts that confine their scrutiny to partisan voting might well find racial bloc voting in circumstances where the losses of minority-preferred candidates were actually attributable to causes other than race. This result it is urged, might unfairly tip the scales in favor of liability.

This argument possesses considerable force. Certainly, the allocation of proof in § 2 cases must reflect the central purpose of the Voting Rights Act and its intended liberality as well as the practical difficulties of proof in the real world of trial. In countless areas of the law weighty legal conclusions frequently rest on methodologies that would make scientists blush. The use of such blunt instruments in examining complex phenomena and corresponding reliance on inference owes not so much to a lack of technical sophistication among judges, although this is often true, but to an awareness that greater certitude frequently may be purchased only at the expense of other values. Here, we are told that we cannot ignore the significant and, assertedly, unacceptable substantive consequences that would accompany a more nuanced bloc voting inquiry. Requiring plaintiffs affirmatively to establish that white voters' rejection of minority-preferred candidates

was motivated by racial animus would make racial bloc voting both difficult and, considering the additional analysis that would be needed, expensive to establish. *See, e.g.*, McCrary, *Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits*, 28 How. L. J. 463, 492 (1985). Moreover, it would facilitate the use of thinly-veiled proxies by permitting, for example, evidence that a minority candidate was regarded as "unqualified" or "corrupt" to defeat a claim that white voters' refusal to support him was based on race or ethnicity. The argument continues that an inquiry into causation beyond partisan affiliation seems inconsistent with the fundamental division between "partisan politics" and "racial vote dilution" set out by the Court in *Whitcomb* and *White* and confirmed by Congress. Legal standards of necessity reflect a balance of competing considerations. Finally, the argument continues that limiting the racial bloc voting inquiry to a determination whether or not divergent voting patterns are attributable to partisan differences or an underlying divergence in interests best captures the mandate of § 2.[27] Having said this, we need not resolve the debate today. Whether or not the burden of the plaintiffs to prove bloc voting includes the burden to explain partisan influence, the result is the same. This is so even if the partisan voting is viewed as a defensive parry.

Finally, we recognize that even partisan affiliation may serve as proxy for illegitimate racial considerations. Minority voters, at least those residing in the contested counties in this case, have tended uniformly to support the Democratic Party. At the same time, a majority of white voters in most counties have consistently voted for district court candidates fielded by the Republican Party. Noting

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[27]The facts of this case do not require us to determine whether *defendants* may attempt to prove that losses by minority-preferred candidates are attributable to non-racial causes other than partisan affiliation. We express no opinion on this entirely separate question.

this persistent, albeit imperfect correlation between party and race, plaintiffs assert that a determination that partisan affiliation best explains voting patterns should not foreclose § 2 liability in this case because the Republican and Democratic Parties are proxies for racial and ethnic groups in Texas. *Whitcomb*'s distinction between "racial vote dilution" and "political defeat at the polls" should not control, they contend, for "partisan politics" *is* "racial politics."

We fully agree with the plaintiffs that the bloc voting inquiry, like the "question whether the political processes are 'equally open,'" must rest "upon a searching practical evaluation of the 'past and present reality.'" S.Rep. 417 at 30 (quoting *White*, 412 U.S. at 769-770), *reprinted in* 1982 U.S. Code Cong. & Admin. News at 208. Indeed, the refusal of Congress and the Supreme Court to equate losses at the polls with actionable vote dilution where these unfavorable results owe more to party than race may be traced directly to this "functional" view of political life. Plaintiffs are therefore entirely correct in maintaining that courts should not summarily dismiss vote dilution claims in cases where racially divergent voting patterns correspond with partisan affiliation as "political defeats" not cognizable under § 2.

We do not agree, however, that a "functional" and "practical" review of Texas judicial elections exposes political parties as proxies for race or ethnicity. In assessing the record before us, we do not indulge in the hopeful yet unrealistic assumption that decisions to support particular political parties among black and white voters in all cases rest on issues other than race. We instead focus on the same two factors cited by the Court in *Whitcomb* and the concurring Justices in *Gingles*. First, white voters constitute the majority of not only the Republican Party, but also the Democratic Party, even in several of the counties in which the former dominates. In Dallas County, for example, 30-40% of white voters consistently support Democrats, making white Democrats more numerous than all of the minority Democratic voters combined. The suggestion that

Republican voters are galvanized by a "white" or "anti-minority" agenda is plausible only to the extent that the Democratic Party can be viewed as a vehicle for advancing distinctively minority interests, which clearly is not the case. At the same time, white Democrats have in recent years experienced the same electoral defeats as minority voters. If we are to hold that these losses at the polls, without more, give rise to a racial vote dilution claim warranting special relief for minority voters, a principle by which we might justify withholding similar relief from white Democrats is not readily apparent. *See Whitcomb*, 403 U.S. at 153.

Second, both political parties, and especially the Republicans, aggressively recruited minority lawyers to run on their party's ticket. Consequently, white as well as minority voters found themselves not infrequently voting against candidates sharing their respective racial or ethnic backgrounds in favor of their party's nominee. In particular, the undisputed evidence discloses that white voters in most counties, both Republican and Democratic, without fail supported the minority candidates slated by their parties at levels equal to or greater than those enjoyed by white candidates, even where the minority candidate was opposed by a white candidate. In Dallas County, for example, Judge Wright, a black woman, received the greatest recorded percentage of the white vote (77%) in her race against a white Democrat. To conclude on this record that political parties serve as proxies for race is simply unwarranted. Because the evidence in most instances unmistakably shows that divergent voting patterns among white and minority voters are best explained by partisan affiliation, we conclude that plaintiffs have failed to establish racial bloc voting in most, but not all, of the counties.[28]

E. *Two Objections*

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[28]Defendant Judge Entz has contended throughout this litigation that § 2, as amended, is unconstitutional. In view of our construction of the statute, we need not reach this question.

The Houston Lawyers' Association and *amicus* the United States raise two particular objections that merit additional consideration. These arguments closely track those made by Justice Brennan--arguments rejected by five members of the Supreme Court in *Gingles*. Nevertheless, the urgency with which they are pressed here warrants a further explanation of the reasons underlying the views expressed by Justice White and Justice O'Connor in their separate opinions.

The Association contends that a requirement that plaintiffs prove that their failure to elect representatives of their choice is attributable to white bloc voting rooted in racial considerations is presumptively inconsistent with § 2's focus on "results." The Association reads this test to impose on plaintiffs the burden of affirmatively establishing that white voters are motivated by racial animus in selecting candidates. So characterized, the racial bloc voting standard we apply today allegedly contravenes the fundamental purpose of the 1982 amendments by reintroducing the "intent" test announced in *Mobile v. Bolden*, 446 U.S. 55 (1980). *See also* Richard L. Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 How. L. J. 495, 498 (1985). That is not so.

The Association does not seriously contend that the legislative history accompanying the amendments to § 2 lends direct support for its position. The Senate Report quite unambiguously declares that Congress intended to "make clear that plaintiffs need not prove a discriminatory purpose *in the adoption or maintenance* of the challenged practice or system in order to establish a violation." S. Rep. 417 at 27 (emphasis added), *reprinted in* 1982 U.S. Code Cong. & Admin News at 205. Moreover, far from suggesting that the presence of racial animus in the electorate was irrelevant, supporters of the 1982 legislation maintained that the amendments were necessary precisely in order to reach such "private discrimination." *See, e.g.*, *Hearings on the Voting Rights Act Before the Subcomm. on the Constitution of the Senate Comm. of the Judiciary*, 97th

Cong., 2d Sess. 1367-68 (statement of Prof. Drew Days). The Association instead insists that a standard requiring § 2 plaintiffs to show that their failure to elect representatives of their choice is attributable to white bloc voting rooted in racial considerations "frustrate[s] the goals Congress sought to achieve by repudiating the intent test of [*Bolden*]." *Gingles*, 478 U.S. at 71 (opinion of Brennan, J.). Given the palpable tension between "the goals Congress sought to achieve" and those it actually expressed, it is hardly surprising that the principles the Association purports to locate in the Senate Report bear only a passing resemblance to those offered by Congress. *Compare Gingles*, 478 U.S. at 70-73 (opinion of Brennan, J.) *with* S. Rep. 417 at 36-37, *reprinted in* 1982 U.S. Code Cong. & Admin News at 214-15.

More importantly, the Association's contention that an inquiry into the explanations underlying racially divergent voting patterns somehow conflicts with Congress' abandonment of the intent requirement announced in *Bolden* completely ignores the fact that the Senate Report expressly adopted the standard we employ in codifying the "results" test. Indeed, like Justice Marshall in *Bolden* itself, see 446 U.S. at 109 (Marshall, J., dissenting), the Senate Report reiterated *Whitcomb*'s holding that "[t]he failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes" *precisely* in order to show that "intent had [not] been required to prove a violation." S. Rep. 417 at 21 (quoting *Whitcomb*, 403 U.S. at 153), *reprinted in* 1982 U.S. Code Cong. & Admin News at 198. In keeping with *Whitcomb*, the Senate Report equated "racial bloc voting" with proof that "race is the predominant determinant of political preference." *Id.* at 33, *reprinted in* 1982 U.S. Code Cong. & Admin News at 211. The Association's assertion that the test we confirm today is inconsistent with "the goals Congress sought to achieve" in amending § 2 becomes plausible only if *Whitcomb* is purged from our voting rights jurisprudence. It is therefore not coincidental that its brief, like Justice Brennan's opinion, see

Gingles, 478 U.S. at 61-74, fails to include a citation, let alone a discussion, of the decision Congress intended to codify.

The United States offers a second argument incorporating elements of Justice O'Connor's as well as Justice Brennan's opinion in *Gingles*. The government agrees with Justice O'Connor that an inquiry into the causes underlying polarized voting is appropriate in certain circumstances. It follows Justice Brennan, however, in maintaining that evidence tending to show that divergent voting patterns are attributable to partisan affiliation or a divergence in interests rather than race is irrelevant in assessing whether plaintiffs have established legally significant white bloc voting. We disagree with this argument as well.

The United States' assertion that partisan affiliation cannot serve to explain voting patterns finds no support in Justice O'Connor's opinion. The very inquiry it seeks to exclude--whether election returns track "an underlying divergence in the interests of minority and white voters,"--was the only non-racial cause expressly cited in her opinion as a possible explanation of divergent voting patterns. *See Gingles*, 478 U.S. at 100 (O'Connor, J., concurring).

The United States argues that the political differences frequently observed among white and minority voters are largely the product of disparities in socioeconomic status, which are themselves attributable to the presence or absence of past discrimination. In this view, a standard that would permit divergence in interest to preclude the establishment of racial bloc voting "would render meaningless the Senate Report factor that addresses the impact of low socioeconomic status on a minority group's level of participation." *Gingles*, 478 U.S. at 69.

This argument is not without force; it is, however, clearly foreclosed by the Senate Report. Congress was not unaware that political preference often correlates strongly with socioeconomic status; particularized needs clearly give rise to particularized interests. This observation did not,

however, lead Congress to soften the line between partisan politics and racial vote dilution established by the Court in *Whitcomb*. To the contrary, the Senate Report not only adopted *Whitcomb*'s holding without modification, but expressly reminded its readers in so doing that the vote dilution claim dismissed by the *Whitcomb* Court as "a mere euphemism for political defeat at the polls" had been brought by "black ghetto residents with [distinct] legislative interests." S. Rep. 417 at 20, *reprinted in* 1982 U.S. Code Cong. & Admin News at 198. The argument pressed here by the United States has been acknowledged, and rejected, by Congress.

The Senate factor cited by Justice Brennan in support of his refusal to attach relevance to a divergence of interests expressly relates, not to whether minority groups have been able to elect representatives of their choice, but to "the extent to which members of the minority group . . . bear the effects of discrimination in areas such as education, employment, and health, *which hinder their ability to participate in the political process*." S. Rep. 417 at 29 (emphasis added), *reprinted in* 1982 U.S. Code Cong. & Admin News at 206. As the Court in *Chisom v. Roemer* confirmed, § 2 plaintiffs "must allege an abridgement of the opportunity to participate in the political process *and* to elect representatives of one's choice." 111 S.Ct. at 2365 (emphasis in original). The effects of past discrimination, as the text of the Senate Report indicates, pertain solely to the "political access" prong of a § 2 claim. It is by considering these effects in this regard, not in the bloc voting inquiry, that courts give effect to congressional intent. The United States' approach, by contrast, would allow this single factor to assume dispositive significance in both of these inquiries. In so doing, it would permit liability to attach, in direct conflict with the Senate Report, upon "the mere existence of underrepresentation plus a history of dual schools." S. Rep. 417 at 34, *reprinted in* 1982 U.S. Code Cong. & Admin News at 212. Electoral losses that are attributable to partisan politics do not implicate the protections of § 2.

IV. Other Legal Errors Affecting the Vote Dilution Inquiry

Defendants cite three additional legal errors that allegedly infect the district court's findings of illegal vote dilution in each of the counties. Specifically, they argue that the district court erred in: (1) excluding elections pitting Hispanic candidates against white candidates in counties in which the evidence unmistakably showed that black and Hispanic voters were cohesive; (2) refusing to consider the paucity of minority lawyers in assessing the extent to which members of minority groups had been elected to the district court; and (3) finding that the effects of past discrimination hindered the ability of minority groups to participate in the political process despite the presence of little or no evidence suggesting that their participation was in fact depressed. We examine these issues in turn.

A. *Cohesiveness of Different Minority Groups*

The importance of the distinction in § 2 jurisprudence between illegal vote dilution and political defeat, between protecting racial minorities and fostering the work of political coalitions, raises the stakes for the question whether different racial or ethnic minority groups, usually blacks and Hispanics, may combine to form a single minority group within the meaning of the Voting Rights Act. Judges and commentators alike have questioned whether transitory unions rooted in political expedience may be properly equated with those whose source lies in the more enduring bonds supplied by a shared race or ethnicity. *League of United Latin American Citizens v. Midland Indep. School District*, 812 F.2d 1494, 1505-07 (5th Cir. 1987) (Higginbotham, J., dissenting); Katherine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a 'Rainbow Coalition' Claim the Protection of the Voting Rights Act?*, 21 Pacific L.J. 619, 641-57 (1990). Nevertheless, we have treated the issue as a question of fact, allowing aggregation of different minority groups where the evidence suggests that they are politically cohesive, see, e.g., *Midland I.S.D.*, 812 F.2d at

1500-02, and we need not revisit this question here.

This issue is raised today in the context of the particular elections to which the district court looked as part of its inquiry into racial bloc voting. This court has consistently held that elections between white candidates are generally less probative in examining the success of minority-preferred candidates, generally on grounds that such elections do not provide minority voters with the choice of a minority candidate. *See, e.g., Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987). For this reason, courts usually focus on those elections involving black or Hispanic candidates in examining whether black or Hispanic voters enjoy an equal opportunity to elect representatives of their choice. Where blacks and Hispanics are cohesive, we have held that the relevant elections are those including either Hispanic or black candidates. *See, e.g., Baytown*, 840 F.2d at 1245. Defendants contend that the district court erred in refusing to consider elections pitting Hispanic and white candidates in Harris and Tarrant Counties, counties in which plaintiffs proceed on behalf of black voters only, but where the evidence indisputably showed that blacks and Hispanics were politically cohesive. In light of our precedents, we must agree.

Blacks and Hispanics have joined forces for purposes of this suit in Midland, Lubbock, and Ector Counties. In these counties, white-Hispanic elections are relevant in proving legally significant white bloc voting, for the Hispanic candidate provides the combined Hispanic-black minority with a viable minority choice. But plaintiffs contend that where they represent only black voters, white-Hispanic elections in which the Hispanic candidate received the support of black voters are irrelevant. A difference in litigation strategy cannot support this distinction. Cohesion is a fact, not a strategic card to be played at the caprice of a plaintiff. As we stated in *Campos*, "if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown." *Id.* at

1245 (footnote omitted). If blacks and Hispanics vote cohesively, they are legally a single minority group, and elections with a candidate from this single minority group are elections with a viable minority candidate.

Plaintiffs next argue that there is evidence in the record that blacks and Hispanics are not politically cohesive in Harris and Tarrant Counties. They do not tell us to which evidence they refer, and understandably so. The record shows that blacks and Hispanics were more cohesive in Harris and Tarrant Counties than in Midland and Ector Counties, counties in which plaintiffs represent both blacks and Hispanics and the district court found cohesion.

In Harris County, Taebel studied 45 elections in which he determined the percentage of black and Hispanic votes cast for the minority/winning candidate. In 35 elections the black and Hispanic vote percentages varied by less than 10%. Similarly, the levels of black and Hispanic support for the same candidate were within ten percentage points in 13 of the 17 elections studied in Tarrant County. In Midland County, by contrast, the black and Hispanic voting percentages differed by less than 10% in only 4 of the 8 elections analyzed; in Ector County, this close correlation between the preferences of Hispanic and black voters was shown in just 2 of 10 elections. Under the present law of this circuit, there is no error in the district court's findings of cohesion in Midland, Ector, and Lubbock Counties, because in those counties a significant number of blacks and Hispanics *usually* voted for the same candidates. *Gingles*, 478 U.S. at 56. But this standard also compels the conclusion that there is also black-Hispanic cohesion in Harris and Tarrant Counties. The district court thus clearly erred in ignoring elections involving Hispanic and white candidates in these counties.[29]

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[29]The dissent points out that defendants did not ask the trial court to make a specific finding that black and Hispanic voters were

(continued...)

B. *Relevance of Small Number of Minority Lawyers*

The absence of minority office holders is typically an important consideration in dilution cases. In this litigation, the small number of minority judges in the target counties has been the cornerstone of the plaintiffs' proof.

The office of district judge has more eligibility requirements than the age and citizenship prerequisites of many public offices. A person must be a licensed attorney in the state of Texas for four years, and a resident of the district for two years, before becoming eligible for the post. The need for district judges to be experienced lawyers is obvious.

Undisputed evidence shows that in all of the counties, the percentage of minority lawyers was much smaller than the percentage of minority voters. In fact, minority lawyers disproportionately serve as judges, when their percentage among all eligible lawyers is considered. It is true that we have refused "to preclude vote dilution claims where few or no [minority] candidates have sought offices in the challenged electoral system." *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1208 n.9 (5th Cir. 1989) (*Westwego I*). That holding is a far cry from the conclusion that the number of minority candidates *eligible* to run has no relevance. Section 2 and the Senate Report instruct us to consider the number of minority candidates elected to office. At the same time, we are instructed to evaluate the totality of the circumstances with a "'functional' view of the political process." *Gingles*, 478 U.S. at 45, 106 S.

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[29](...continued)
politically cohesive in Harris and Tarrant Counties. This observation, while correct, is beside the point, for that is not the claim they raise on appeal. Rather, defendants argue that the district court improperly refused to consider elections involving Hispanic candidates studied by Dr. Taebel, their expert. This question is most assuredly before us and, given the overwhelming evidence of cohesiveness among black and Hispanic voters in Harris and Tarrant Counties, is susceptible to only one answer.

Ct. at 2764. The cold reality is that few minority citizens can run for and be elected to judicial office. A functional analysis of the electoral system must recognize the impact of limited pools of eligible candidates on the number of minority judges that has resulted. *See Southern Christian Leadership Conf. of Ala. v. Evans*, 785 F. Supp. 1469, 1476-77 (M.D. Ala. 1992).

The record discloses that at times during the 1980's, the percentage of minority judges in five targeted counties exceeded the percentage of minority lawyers who were eligible to run for district judge. The following table summarizes the evidence.

Table IV.B

County	Minority Judges as %age of District Judges, 1988	Minority Lawyers as %age of Eligible Lawyers, 1989	Minority Voters as %age of Voting Age Population
Dallas	8.3	1.0	16.0 (black)
Harris	5.1	3.8	18.2 (black)
Tarrant	13.0	2.4	10.4 (black)
Bexar	26.3	11.4	41.4 (Hispanic)
Travis	7.7	2.7	14.4 (Hispanic)
Jefferson	0.0	3.1	24.6 (black)
Lubbock	0.0	5.1	21.6 (both)
Midland	0.0	3.2	19.7 (both)
Ector	0.0	4.0	21.9 (both)

In counties with no minority judges, the number of eligible candidates was very small. In Ector County, for example, one survey found five eligible Hispanic lawyers and only one eligible black lawyer. Apparently none of Lubbock County's 499 lawyers in 1989 was a black attorney eligible for a district judgeship, although the State Bar reported two black lawyers in the county.

The absence of eligible candidates goes a long way in explaining the absence of minority judges. Plaintiffs cannot emphasize the scarcity of successful minority candidates to support the inference of dilution and simultaneously urge that the number of minorities eligible to run is not relevant.

Plaintiffs argue that this factor may not be considered because the limited number of minority lawyers was caused by state discrimination in education. We are not persuaded this argument merits exclusion of the evidence. The Voting Rights Act responds to practices that impact *voting*; it is not a panacea addressing social deficiencies. *See Presley v. Etowah County Comm'n*, ___ U.S. ___, ___, 112 S. Ct. 820, 832 (1992).

C. Past Discrimination

The district court also found that Texas' history of discrimination "touched many aspects of the lives of minorities in the Counties in question including their access to and participation in the democratic system governing this State and their socio-economic status."[30] The district court, however, did not refer to specific facts in the record to support this conclusion. Instead, the court cited a 1980 Civil Rights Commission Report describing civil rights developments in Texas during the years 1968-1978 and a 1981 district court opinion detailing race relations between minority and white residents of one of Texas' smaller cities during the 1960's and 1970's.

Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the

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[30]Two separate *Zimmer* factors guided the court's inquiry:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> . . . . . .
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

S. Rep. 417 at 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206.

subject of dispute among the parties. Nor has anyone questioned plaintiffs' assertion that disparities between white and minority residents in several socioeconomic categories are the tragic legacies of the State's discriminatory practices. Defendants do argue, however, that these factors, by themselves, are insufficient to support the district court's "finding" that minorities do not enjoy equal access to the political process absent some indication that these effects of past discrimination actually hamper the ability of minorities to participate. We again agree.

It would seem tautological that a factor directing courts to determine whether past discrimination hinders a minority group's access to the political process would require a showing that the group does not in fact participate to the same extent as other citizens. Nevertheless, prior to the amendments to § 2, this court held that evidence of decreased participation among minorities was unnecessary on grounds that "[i]nequality of access is an inference which flows from the existence of economic and educational inequalities." *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir. 1977) (*en banc*). This standard, however, was challenged by some of our later cases, *see, e.g.*, *McIntosh Cty. NAACP v. City of Darien*, 605 F.2d 753, 759 (5th Cir. 1979), and was decisively rejected by Congress in 1982. As the Senate Report stated:

> The courts have recognized that disproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, *and where the level of black participation in politics is depressed*, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

S. Rep. 417 at 29 n.114 (emphasis added), *reprinted in* 1982 U.S. Code Cong. & Admin. News at 207 n.114. As this statement discloses, the Senate Report, while not insisting upon a causal nexus between socioeconomic status and

depressed participation, clearly did not dispense with proof that participation in the political process is in fact depressed among minority citizens. In apparently holding that socioeconomic disparities and a history of discrimination, without more, sufficed to establish these *Zimmer* factors, the district court employed the wrong legal standard.

Nor do we believe that the record before us can support such a finding under the proper test. Plaintiffs have offered no evidence of reduced levels of black voter registration, lower turnout among black voters, or any other factor tending to show that past discrimination has affected their ability to participate in the political process. While there are indications that Hispanic citizens register to vote at a lower rate than white and black citizens, this data provides support for such a finding in only Bexar and Travis Counties, where plaintiffs proceed on behalf of Hispanic voters only.

Plaintiffs contend that the district court could have relied on the opinion offered by Dr. Brischetto, who, during his testimony regarding Bexar County, stated:

> Well, certainly having less of these socioeconomic resources or characteristics to draw on, we find that minority voters will participate less in the electoral system. Education is an important resource. For example, it enables people to feel like they are more a part of and take part in the election system to a greater extent. Lacking that they participate less. So it is important, it has an effect certainly on their participation when they are subordinate status in the stratification system.

Brischetto's statement, as its tone suggests, was not so much a finding as a prediction or hypothesis about what one might expect to find among minorities who still bore the scars of past discrimination. It is for this reason that he could claim that his testimony regarding the participation of Hispanics in Bexar applied with equal force to all of the other counties. In fact, the nature and basis of his opinion became explicit as the testimony shifted to these other locales. In

Travis County, for example, he stated only that "stratification . . . *may* very well also be an indication of the fact that Hispanics are less likely to participate fully and effectively in the electoral system in Travis County." In Lubbock, Brischetto stated only that "I think [such stratification] is an indication that minorities are less equipped with those resources that they need to participate fully in the political system." Finally, he testified in the context of Tarrant County that socioeconomic differences "indicate[] that minorities *may* have a diminished ability to participate fully in the electoral system because of their lower status and stratification that exists in that community."

Brischetto's testimony thus provides support for the common sense proposition that depressed political participation typically accompanies poverty and a lack of education; it certainly does not amount to proof that minority voters *in this case* failed to participate equally in the political processes. A district court's findings under § 2 must rest on an "intensely local appraisal" of the social and political climate of the cities and counties in which such suits are brought, *White*, 412 U.S. at 769, not the sort of generalized armchair speculation supplied by Dr. Brischetto. We need evidence, not musings.

Plaintiffs also contend that minority citizens' lack of financial resources makes it very difficult for minority-preferred candidates to secure funds sufficient to run creditable county-wide campaigns. Here again, the inference plaintiffs ask us to draw might well be true in most cases; regardless of its general validity, however, it is no substitute for proof that a minority group's poverty has had the predicted effect in this particular case. The evidence presented at trial simply does not show that past discrimination has inhibited the ability of minorities to participate in the process. In fact, the record discloses that minority-preferred candidates frequently raised and spent more money that their white opponents.

Witnesses Coronado and Fitch did testify that minority candidates generally were unable to raise the

money necessary to run county-wide. When asked about the only district court campaign in which he was personally involved, however, Coronado made no mention of money problems. In fact, he testified that "[Judge Gallardo] ran a very good campaign. I mean he was, he understood the media, had people out working boxes, he had a lot of attorneys of all ethnic groups working in his campaign, a broad base campaign in the community." Similarly, Fitch asserted that black incumbents had difficulty raising funds, but she attributed this difficulty to "racial discrimination" and black candidates' "past record of losing."

In contrast with the highly equivocal testimony of Fitch and Coronado concerning their impressions of the barriers facing minority candidates, nearly all such candidates who appeared at trial reported that they had outspent their white opponents, often by a very large amount. In Midland County, for example, Watson testified that she outspent her white opponent in the general election for Justice of the Peace by a factor of six. In Dallas County, Joan Winn White, Tinsley, H. Ron White, and Oliver all testified that they had run extensive, well-financed campaigns. In particular, Oliver stated that he spent $300,000 in a losing effort. The same was true of minority-preferred candidates in Harris County. Lee testified that she outspent her white opponent at a rate approaching twelve to one; Berry stated that the ratio in his campaign for district court was even greater. Finally, Leal testified that he raised $85,000 to $90,000 to his opponent's $1,000. A district court's findings may only rest on the evidence presented at trial. The record before us does not remotely suggest that the visible scars of discrimination have left minority-preferred candidates and their supporters within minority communities without the funds needed to launch broad-based, county-wide campaigns. In fact, the available evidence shows just the opposite. For this reason, we must conclude that plaintiffs have not established that the effects of past discrimination have hindered their ability to participate in the political process.

V. Texas' Linkage Interest

This case involves 172 judicial districts that coincide with nine Texas counties. Given the State of Texas' county-based system of venue, this venerable structure links the jurisdictional and electoral bases of the district courts. In doing so, the structure advances the state's substantial interest in judicial effectiveness. Trial judges are elected by a broad range of local citizens, rather than by a narrow constituency. This electoral scheme balances accountability and judicial independence.

As explained in detail below, the state's interest in maintaining the structure of this single-member judicial office must be weighed in the totality of circumstances to determine whether a § 2 violation exists. The weight of a substantial state interest, determined as a matter of law, is balanced against localized evidence of racial vote dilution. This substantial state interest may be overcome only by evidence that sums to substantial proof of racial dilution. Otherwise, the at-large election of district court judges does not violate § 2.

A. *The Structure of Texas District Courts*

The district courts are the primary trial courts in Texas. District judges were first elected in 1850, five years after statehood, and every state constitution since 1861 has provided for their election by county residents. All voters of the entire county elect all the district judges of their county. The political boundaries of each county are the boundaries of the jurisdiction and election base in all of the challenged counties.[31] Many counties in Texas have more than one district judge. Even so, trials are presided over by district judges acting alone. The only collegial decision-making by district judges in counties with more than one district judge is in the handling of some administrative matters. In some of the counties involved here, district courts are designated

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[31]One exception is the 72nd District, which encompasses both Lubbock and Crosby Counties.

to specialize in civil, criminal, or family law cases.

The electoral bases of district judges are linked to the area over which they exercise primary jurisdiction. This linkage has been in place throughout the 143 year history of judicial elections in Texas. By making coterminous the electoral and jurisdictional bases of trial courts, Texas advances the effectiveness of its courts by balancing the virtues of accountability with the need for independence. The state attempts to maintain the fact and appearance of judicial fairness that are central to the judicial task, in part, by insuring that judges remain accountable to the range of people within their jurisdiction. A broad base diminishes the semblance of bias and favoritism towards the parochial interests of a narrow constituency. Appearances are critical, because "the very *perception* of impropriety and unfairness undermines the moral authority of the courts." John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 Baylor L. Rev. 339, 364 (1988). The fear of mixing ward politics and state trial courts of general jurisdiction is widely held. It is not surprising then that states that elect trial judges overwhelmingly share this structure and electoral scheme. *See infra* note 30. The systemic incentives of subdistricting are those of ward politics, and would "diminish the appearance if not fact of its judicial independence--a core element of a judicial office." *LULAC II*, 914 F.2d at 650 (Higginbotham, J., concurring).

B. *The Role of Function Under § 2*

In *Houston Lawyers' Association v. Attorney General*, U.S. , 111 S.Ct. 2376 (1991), the Supreme Court agreed that the interests behind the existing court structure must be considered.

> [W]e believe that the State's interest in maintaining an electoral system--in this case, Texas' interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters--is a legitimate factor to be considered by courts among the "totality of circumstances" in determining whether a § 2 violation has occurred. A

> State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry . . . . Because the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices is merely one factor to be considered in evaluating the "totality of circumstances," that interest does not automatically, and in every case, outweigh proof of racial vote dilution.

Id. at ___, 111 S. Ct. at 2381.

Justice Stevens noted that Texas' interest in linking electoral and jurisdictional bases is "a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred." *Id.* The Court was not persuaded that this "linkage" interest should defeat liability "automatically, and in every case." Rather, *Houston Lawyers'* held that the interest must be weighed against other relevant factors to ascertain whether the interest "outweigh[s] proof of racial vote dilution." *Id. See also Nipper v. Chiles*, 795 F. Supp. 1525, 1548 (M.D. Fla. 1992) (holding that "a state's interest in maintaining an electoral system is a legitimate factor to be considered ... in the liability phase of a section two case").

An examination of *Houston Lawyers'* further illuminates why the state interests behind an office's structure and function must be weighed. The Court held that single-member office elections are within the scope of § 2. *Houston Lawyers'*, ___ U.S. at ___, 111 S. Ct. at 2380. This holding reached beyond judicial elections. "[T]he coverage of the Act encompasses the election of *executive officers* and trial judges whose responsibilities are exercised independently in an area coextensive with the districts from which they are elected." *Id.* (emphasis added). It appears from this language that an office such as mayor or sheriff is subject to § 2 scrutiny, requiring an analysis of the totality of circumstances to determine whether illegal vote dilution exists. While that analysis is not precluded, it must take into account the state interests that are furthered by the structure

and function of such single-member offices. Surely by enacting the Voting Rights Act, Congress did not contemplate that the office of mayor in a city would have to be dismantled because its single-member office nature submerged minority voters in the community of voters as a whole, without regard for the interests in preserving that office. *Cf. Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985) (holding that primary runoffs for single-member offices of mayor, city council president, and city comptroller do not violate § 2).

Therefore, while the Supreme Court rejected the contention that the linkage interest in all cases defeated liability under § 2, the Court endorsed the position that the linkage interest is relevant to a determination of liability. Indeed, by noting that the linkage interest does not "automatically, and in every case, outweigh proof of racial vote dilution," the Court held that the state interest *could* outweigh what would otherwise be proof of illegal dilution and thus foreclose liability. As one commentator has noted:

> the Court recognized that in balancing the many factors in the totality of the circumstances test, the state interest in district wide judicial elections may, in some cases, outweigh proof of racial voter dilution.

Mary T. Wickham, Note, *Mapping the Morass: Application of Section 2 of the Voting Rights Act to Judicial Elections*, 33 Wm. & Mary L. Rev. 1251, 1285 (1992).

The issue we face is determining when the linkage interest will outweigh other factors and defeat liability under § 2. In resolving this issue, we reject the polar extremes of the parties. The State of Texas maintains that the linkage interest must defeat liability in *every* case, regardless of the other circumstances in the totality. The Supreme Court rejected this position when it held that the linkage interest does not "automatically, and in every case, outweigh proof of racial vote dilution." *Houston Lawyers'*, ___ U.S. at ___, 111 S. Ct. at 2381.

We also reject the position of plaintiffs that the linkage interest can never defeat liability under the totality

of circumstances if "illegal" dilution is otherwise established. The plaintiffs maintain that only the *absence* of a compelling state interest in an electoral scheme is relevant to liability, and that such an absence "is an optional factor" that plaintiffs can use to *support* a finding of illegal dilution. They contend, however, that the existence of a compelling interest can never *defeat* liability that is otherwise established under the totality of the circumstances. This position is foreclosed by the Supreme Court, which directed that this state interest is to be weighed as part of the totality of the circumstances. *Id.*

Citing *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984), and *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984), plaintiffs urge that the *Zimmer* factor of a non-tenuous state policy is among the least important of the factors for determining dilution. These decisions state only that defendants cannot defeat liability by using the non-tenuous policy justification of an electoral scheme to prove that scheme "does not have a discriminatory intent." *Marengo County*, 731 F.2d at 1571. *See also Terrazas v. Clements*, 581 F. Supp. 1319, 1345 n.24 (N.D. Tex. 1983) (three-judge panel) ("In the case of tenuousness, the lesser weight is consistent with the change in emphasis from intent to results. The principal probative weight of a tenuous state policy is its propensity to show pretext.").

The plaintiffs' argument misses the point. The State of Texas has done more than assert that its interest in this electoral scheme is not tenuous--that is, not a pretext masking discriminatory intent in the adoption or maintenance of the scheme. The interest in linking electoral to jurisdictional base takes on additional and distinct relevance because it advances objectively substantive goals. The inquiry into whether an interest is substantial goes beyond inquiring whether the interest is non-tenuous. A *substantial* state interest must be more than racially-neutral. Thus, the linkage interest is not examined just because it proves that the state's practice is premised on a racially-

neutral policy and is consistently applied. *Cf.* S. Rep. 417 at 29 n.117, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 207 n.117.

Proof of a merely non-tenuous state interest discounts one *Zimmer* factor, but cannot defeat liability. It does not follow, however, that proof of a *substantial* state interest cannot defeat liability. The totality of circumstances inquiry that occurs after a showing of the *Gingles* prerequisites is not limited to factors listed in the legislative history of the Voting Rights Act. *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2763; *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1120 (5th Cir. 1991) (*Westwego III*). The weight, as well as tenuousness, of the state's interest is a legitimate factor in analyzing the totality of circumstances. As we have explained, the Voting Rights Act largely codifies Fourteenth Amendment jurisprudence embodied in *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973). *See Jones*, 727 F.2d at 379-80. The substantiality of the state's interest has long been the centerpiece of the inquiry into the interpretation of the Civil War Amendments and their interplay with the civil rights statutes.

Having rejected the proffered extremes--that the linkage interest either always or never defeats § 2 liability--we turn to *when* the linkage interest precludes a § 2 violation. This question depends upon the weight of the interest.

C. *Weight of State's Interest Is Matter of Law*

The plaintiffs urge that the weight or substantiality of Texas' linkage interest is an issue of fact for the district court to decide in the first instance, reviewable only for clear error. We disagree. Deciding whether the adoption or maintenance of a system is a pretext for racial discrimination

may present a question of fact.[32] This question can turn on credibility, an issue best determined by a fact finder. The issue of substantiality, however, is distinct from the conventional *Zimmer* factor of tenuousness and is a legal determination.

The Supreme Court has held that the finding of dilution is a factual matter reviewable only for clear error. *Gingles*, 478 U.S. at 78, 106 S. Ct. at 2780-81. A substantial state interest is not inherently preclusive of dilution and is not raised to disprove the existence of dilution. Rather, the state's interest is weighed *against* proven dilution to assess whether such dilution creates § 2 liability. *Houston Lawyers'*, ___ U.S. at ___, 111 S. Ct. at 2381 (weighing of linkage interest on remand goes to determination of whether interests "outweigh proof of racial vote dilution").

Determining the substantiality of Texas' linkage interest under the Voting Rights Act, a statute enacted to enforce the guarantees of the Civil War Amendments, is analogous to weighing the asserted state interest in constitutional law contexts. With issues of substantive due process, equal protection, and the First Amendment, the weight of a state's interest has always been a legal question, not a factual one. For example, in *Posadas de Puerto Rico Ass'n v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341, 106 S. Ct. 2968, 2977, 92 L. Ed. 2d 266 (1986), the Court had "no difficulty in concluding that the Puerto Rico Legislature's interests in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest." In reaching this conclusion, the Court itself determined the weight of the state interest. *See also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985) (weighing state's interest de novo). We hold that the

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[32]We do not decide this issue. Some appellate court decisions appear to have reviewed the tenuousness of state interests without deference to the underlying district court determinations. *See, e.g., Zimmer*, 485 F.2d at 1307.

substantiality of Texas' interest under § 2 is a question of law for this court to determine de novo and not a question of fact that somehow will be described on a county-by-county basis.

D. *Determining the Weight of the Linkage Interest*

The weight of Texas' interest is virtually assigned by a Supreme Court decision handed down on the same day as *Houston Lawyers'*. In *Gregory v. Ashcroft*, ___ U.S. ___, 111 S. Ct. 2395, 2404, 115 L. Ed. 2d 410 (1991), the Supreme Court held that the Age Discrimination in Employment Act does not apply to judicial offices in Missouri. The plaintiffs had used ADEA to challenge a mandatory retirement age for state judges. The Court noted that "the authority of the people of the States to determine the qualifications of their most important government officials . . . lies at the heart of representative government." *Id.* at ___, 111 S. Ct. at 2402 (internal quotation omitted). *Gregory* noted that "the States' power to define the qualifications of their office-holders has force even as against the proscriptions of the Fourteenth Amendment." *Id.* at ___, 111 S. Ct. at 2405. To protect this power to define the judicial office, *Gregory* required a clear statement from Congress for an override of qualifications imposed by the State for important state government office. *Id.* at ___, 111 S. Ct. at 2406. This requirement exists even if ADEA was based upon Congress' powers under the Fourteenth Amendment, rather than the Commerce Clause. *Id.* at ___, 111 S. Ct. at 2405.

"The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform." *Id.* at ___, 111 S. Ct. at 2407. If that interest is compelling, the people of Texas have at least a substantial interest in defining the structure and qualifications of their judiciary. Indeed, Texas' Attorney General has submitted to this court that linkage is a "fundamental right" that "serves [a] compelling interest" of the State of Texas. Linking electoral and jurisdictional bases is a key component of the effort to define the office of district judge. That Texas'

interest in the linkage of electoral and jurisdictional bases is substantial cannot then be gainsaid.

Our confidence in this conclusion is bolstered by the recognition and pursuit of the linkage interest in other states. Courts have recognized the legitimacy and substance of similar linkage interests in Florida and Alabama. *See Nipper v. Chiles*, 795 F. Supp. 1525, 1548 (M.D. Fla. 1992); *Southern Christian Leadership Conf. of Ala. v. Evans*, 785 F. Supp. 1469, 1478 (M.D. Ala. 1992). Of the twenty-nine states that elect their principal trial court judges, including Texas, Alabama, and Florida, twenty-five employ district-wide elections.[33] The overwhelming preservation of linkage in states that elect their trial court judges demonstrates that district-wide elections are integral to the judicial office and not simply another electoral alternative.

The decision to make jurisdiction and electoral bases coterminous is more than a decision about how to elect state judges. It is a decision of what *constitutes* a state court judge. Such a decision is as much a decision about the structure of the judicial office as the office's explicit qualifications such as bar membership or the age of judges.

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[33]The twenty-five are Alabama, Arizona, California, Florida, Georgia, Idaho, Indiana, Kentucky, Michigan, Minnesota, Montana, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Washington, West Virginia, and Wisconsin. Among these states, some appoint a portion of their trial judges, while others hold retention elections after initial selection by contested election. *See generally* 28 The Council of State Governments, *The Book of the States* 210-12 (1990) (table 4.4).

Mississippi and Louisiana only recently abandoned the link between jurisdiction and electoral base in order to settle prolonged litigation.

North Carolina allows every elector within a district court's jurisdiction to vote for its judge by holding statewide elections after district-wide primaries. *See Republican Party of N. C. v. Martin*, 980 F.2d 943, 947 (4th Cir. 1992) (holding that Fourteenth Amendment challenge to system by Republican Party is justiciable).

The collective voice of generations by their unswerving adherence to the principle of linkage through times of extraordinary growth and change speaks to us with power. Tradition, of course, does not make right of wrong, but we must be cautious when asked to embrace a new revelation that right has so long been wrong. There is no evidence that linkage was created and consistently maintained to stifle minority votes. Tradition speaks to us about its defining role--imparting its deep running sense that this is what judging is about.

On the other hand, plaintiffs' interests are not well-served by destroying linkage. The inescapable truth is that the result sought by plaintiffs here would *diminish* minority influence. Minority voters would be marginalized, having virtually no impact on most district court elections. Given that district judges act alone in exercising their power, that use of the Voting Rights Act is perverse. After subdistricting, a handful of judges would be elected from subdistricts with a majority of minority voters. Creating "safe" districts would leave all but a few subdistricts stripped of nearly all minority members. The great majority of judges would be elected entirely by white voters. Minority litigants would not necessarily have their cases assigned to one of the few judges elected by minority voters. Rather, the overwhelming probability would be that the minority litigant would appear "before a judge who has little direct political interest in being responsive to minority concerns." *LULAC II*, 914 F.2d at 650 (Higginbotham, J., concurring). Under the totality of circumstances, we must recognize that breaking the link between the electoral base and the jurisdiction of this single-member office would perversely lessen minority influence on the conduct of most litigation.

The distrust of judicial subdistricts does not rest on paternalism. It recognizes Texas' historic interest in having district judges remain accountable to all voters in their district. Regardless of the race or residency of particular litigants, judges make choices that affect all county residents. Texas has insisted that trial judges answer to all county

voters at the ballot box. Unlike legislators or even appellate judges, who make decisions in groups, each district judge holds a single-member office and acts alone. When collegial bodies are involved, all citizens continue to elect at least one person involved in making a particular decision. While subdistricting for multimember offices can enhance minority influence because members from minority subdistricts participate in and influence all of the decisions of the larger body, subdistricting for single-member district court judgeships would leave minority voters with no electoral influence over the majority of judges in each county. Subdistricting would partially disenfranchise citizens to whom all district judges in a county are now accountable.

By contrast, under the present regime, minority voters participate in all judicial elections in each county. This participation gives minority voters the opportunity to influence all elections, absent significant racial vote dilution. As Justice O'Connor noted in her concurring opinion in *Gingles*, voters can wield influence over elections even when those votes are cast for losing candidates. *Gingles*, 478 U.S. at 98-99, 106 S. Ct. at 2791 (O'Connor, J., concurring). Denying importance to this ability to influence asks that all measures of success be found in the win-loss column. This mandates proportional representation as the measure of dilution, contrary to the explicit terms of § 2. Indisputably, subdistricting would assure the absence of minority influence over the judicial process. *See LULAC II*, 914 F.2d at 649-50 (Higginbotham, J., concurring); *Southern Christian Leadership Conf. of Ala. v. Evans*, 785 F. Supp. 1469, 1478 (M.D. Ala. 1992) (Hobbs, J.) (by subdistricting judicial positions, "black voters ... will ... be sacrificing [an] extremely valuable political right--the right to vote for all of the judges who will be serving as judges in the circuit wherein they live").

Plaintiffs contend that linking jurisdictional and electoral bases does not, in fact, protect these uniquely judicial interests. All of the plaintiffs' arguments reduce to the single contention that Texas does not consistently apply

the policy of linking jurisdictional and electoral bases.

Before addressing these arguments, we note that in assessing the relationship between the end pursued and the means employed, "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Sugarman v. Dougall*, 413 U.S. 634, 648, 93 S. Ct. 2842, 2850, 37 L. Ed. 2d 853 (1973). As both *Sugarman* and *Gregory* make clear, such matters include "the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders." *Sugarman*, 413 U.S. at 648, 93 S. Ct. at 2851. Examining Texas' linking of electoral and jurisdictional bases in light of these considerations, we find that it serves the substantial interests we described.

The plaintiffs contend that Texas district judges often adjudicate controversies involving litigants who are not residents of the county. Defendants make several responses. First, they maintain that because a district judge's area of primary jurisdiction is defined by county-specific venue rules, most residents of a county will have their disputes adjudicated by judges they elect. Second, the residency of particular litigants is not that important. Regardless of the identity of litigants in a case, a district judge may make decisions or grant relief that impact primarily upon the residents of the district.

By drawing attention to venue, plaintiffs only remind us of concerns unique to the district judge's office. Venue rules preserve judicial fairness by preventing forum-shopping and diminishing the chances of biased adjudication. At the same time, the rules keep most local matters in local courts, where local juries are drawn and judges are accountable to voters for the legal and policy choices they make.[34] The

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[34]Texas venue law, as amended in 1983, has been influenced by both Spanish and English principles. Besides protecting civil defendants from inconvenient forums, the rules strive to ensure that

(continued...)

localized focus of district courts is particularly evident in criminal matters, where venue is based on events related to the offense. Tex. Code Crim. Proc. Ann. ch. 13 (Vernon 1977). Domicile and hence convenience to the defendant have never been a consideration. Since the propriety of venue goes to the authority of the court, it is "quasi-jurisdictional in nature." George E. Dix, *Texas Charging Instrument Law: The 1985 Revisions and the Continuing Need for Reform*, 38 Baylor L. Rev. 1, 71 (1986). Thus, Texas law commonly refers to the district court's venue reach as its jurisdiction in criminal matters. *See, e.g., Hodge v. State*, 527 S.W.2d 289, 292 (Tex. Crim. App. 1975); Tex. Code Crim. Proc. Ann. Arts. 21.02(5), 21.21(5) (Vernon 1989).

Similarly, family law matters will almost always be handled by the local district court. *See, e.g.*, Tex. Fam. Code Ann. §§ 3.21, 11.04 (Vernon 1986) (concerning venue in divorce and parent-child relationship suits). Quintessentially local matters such as suits against counties or disputes involving title to real property must be tried in the district court of the same county. Tex. Civ. Prac. & Rem. Code §§ 15.001, 15.015 (Vernon 1986). Whatever the area of practice--whether civil, criminal, or family law--the conclusion reached in the concurring opinion in *LULAC II* remains valid. "[T]he state recognized that elimination of [the] risk and appearance of bias was essential to the office it was creating by an elaborate set of rules controlling venue." 914 F.2d at 651 (Higginbotham, J., concurring). The argument that Texas' venue rules somehow abrogate its interest in linking jurisdiction and electoral bases is illusory.

Plaintiffs also challenge the legitimacy of the state

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[34](...continued)
local matters are tried in local courts. *See generally* Joseph W. McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 Texas L. Rev. 24, 36-40 (1959); Charles T. Frazier, Jr., Note, *Venue Procedure in Texas: An Analysis of the 1983 Amendments to the Rules of Civil Procedure Governing Venue Practice Under the New Venue Statute*, 36 Baylor L. Rev. 241, 241-44 (1984).

interest in linkage by pointing to the use of visiting judges in the district courts. Judges not elected by a district's residents--*e.g.*, judges from another district or retired judges--may be temporarily assigned to a district court, when necessary to dispose of its accumulated business, by the Chief Justice or regional presiding judge. Tex. Gov't Code Ann. § 74.052 (Vernon 1988).[35] A typical occasion for such assignments is when the district judge is vacationing or ill. Plaintiffs have not demonstrated that this measure of expedience represents an abandonment of the interests behind linkage. To the contrary, insofar as linkage involves the appearance of judicial fairness and independence, visiting judges are not inconsistent with its purposes. Because visiting judges will not stand for reelection, they do not create the impression of bias that may accompany a judge elected from a narrow constituency.

Another challenge to the legitimacy of the linkage interest is based upon Article 5, § 7a of the Texas Constitution. Plaintiffs reason that Texas abandoned its linkage interest by allowing the residents of counties to "opt out" of the linkage structure by selecting judges from regions smaller than a county. This contention is without merit. As Chief Justice Phillips explained at trial, § 7a was enacted in 1985 as part of a constitutional and statutory scheme designed to equalize court dockets by allowing the realignment of judicial districts. The provision states that a district smaller than a county may not be created unless approved by a majority of county voters. Tex. Const. Art. 5, § 7a(i). The people of Texas have jealously reserved to themselves, as individual voters, the power to subdivide districts that have always been the size of a county, or larger. Nowhere in Texas' 254 counties have residents voted to break the link between jurisdiction and electoral base. If

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[35]A visiting judge may not, however, hear a civil case over the objection of a party. Tex. Gov't Code Ann. § 74.053 (Vernon Supp. 1993).

anything, § 7a(i)'s unemployment testifies to affirmation, not abrogation, of the interest in linkage.

Moreover, even if one county were to subdivide, the interest in linkage would not be lost in the state as a whole. In *Mahan v. Howell*, 410 U.S. 315, 93 S. Ct. 979, 35 L. Ed. 2d 320, *modified* 411 U.S. 922, 93 S. Ct. 1475, 36 L. Ed. 2d 316 (1973), the Supreme Court recognized that although Virginia divided one county when reapportioning its state legislature, it retained its interest in preserving boundaries of all other political subdivisions. *Id.* at 327, 93 S. Ct. at 986. Texas' interest in preserving the structure of its judiciary by linking jurisdictional and electoral boundaries is greater than a state's interest in observing boundaries in legislative reapportionment, because it serves substantive purposes other than convenience.

Finally, plaintiffs note that some rural district judges, and urban justices of the peace, are elected by a small number of voters. Therefore, plaintiffs contend, judges elected by narrow constituencies are not antithetical to the state's interest in judicial independence. The structure of the justice courts have no bearing on Texas' interests in maintaining its system of district courts. Justices of the peace need not be lawyers, and preside over courts whose subject matter jurisdiction is limited to less significant disputes. For instance, the justice court's criminal jurisdiction is limited to finable misdemeanors. Significantly, the justice of the peace "is powerless to issue injunctions." *Bowles v. Angelo*, 188 S.W.2d 691, 693 (Tex. Civ. App.--Galveston 1945, no writ). The justice court is not a court of record, so when its rulings are appealed, the cases are tried de novo before a county court judge--a judge chosen by district-wide election. In great contrast, district courts are Texas' trial courts of general jurisdiction, charged with trying felony cases and civil matters of unlimited amounts in controversy. As to rural Texas, linkage is preserved, while providing as broad a range of constituents as the countervailing problems of courthouse proximity allow.

E. *Other Means to Accommodate the Linkage Interest*

Plaintiffs urge that the linkage interest can be accommodated even if the existing scheme were found to be illegal. They offer two alternatives: either a complete overhaul of the existing venue scheme or the use of unconventional electoral methods that preserve at-large voting. The plaintiffs suggest that a scheme of single-member districts may preserve linkage, by making each district judge's area of primary jurisdiction co-extensive with the single-member district from which the judge is elected. Plaintiffs provide no evidence that such a radical reworking of the venue of Texas courts would be administratively feasible. The district court likewise simply asserted that such an arrangement of venue limited to a single-member district could accommodate Texas' interests, without a glance at the feasibility of such an arrangement. One look at Harris County cut into a grid of dozens of venue blocks is enough to show the bizarre nature of this proposal.

We cannot conclude that Texas' interests could be adequately accommodated by such a radical reworking of Texas' venue rules. The proposal illustrates how different the judicial offices' at-large election scheme is from legislative and executive at-large elections. Plaintiffs must propose not only changing the means by which Texas' district judges are selected, but also its system of venue, perhaps of case assignment procedures, and maybe even its jury selection methods. The necessity for such proposals is a powerful testament to the reality that linkage is an essential part of the structure of the judicial office, much more than the method of electing the office holder.

The plaintiffs also contend that the linkage interest deserves little weight because it might be accommodated by remedies other than subdistricting. In particular, plaintiffs point to the use of limited voting or cumulative voting. The Supreme Court, of course, "strongly prefer[s] single-member districts for federal court-ordered reapportionment." *Growe v. Emison*, ___ U.S. ___, ___, 113 S.Ct. 1075, 1084 (1993). In any event, we do not agree that this argument

undermines the substantiality of the state's interest.

The allegedly illegal facet of the existing electoral scheme is that it employs at-large elections. Both plaintiffs' amended complaint and plaintiff-intervenors' complaint-in-intervention assert that the existing "at large scheme" violates § 2, and pray for a court order "that district judges in the targeted counties be elected in a system which contains single member districts." By employing at-large elections, the people of Texas have linked the electoral and jurisdictional base of the district judge.

Limited and cumulative voting are election mechanisms that preserve at-large elections. Thus, they are not "remedies" for the particular structural problem that the plaintiffs have chosen to attack. At trial, plaintiffs attempted to prove the three *Gingles* prerequisites. This test establishes "that the minority has the potential to elect a representative of its own choice in some single-member district" and "that the challenged districting thwarts a distinctive minority by submerging it in a larger white voting population." *Growe*, ___ U.S. at ___, 113 S. Ct. at 1084. Plaintiffs then tried to supplement that evidence with proof of *Zimmer* factors, such as past discrimination and anti-single shot voting rules. The question presented by this lawsuit is whether Texas' at-large election of district judges violates § 2. To answer that question, we must determine the weight of the state's linkage interest. We will not discount that interest based upon purported remedies that preserve the challenged at-large scheme. Plaintiffs cannot attack at-large voting as a violation of § 2, and then ignore the special characteristics of the judicial office by insisting that they will embrace a remedy that preserves that scheme. To do so would completely shunt consideration of the interest to the remedy stage, contrary to *Houston Lawyers'*.

F. *Balancing the State's Interest*

In finding that Texas' interest is substantial, we recognize that it will not always defeat § 2 liability. Substantiality is not quantifiable, and we translate its force in the practical world of trials to the burden required to

overcome it. As we see it, plaintiffs cannot overcome a substantial state interest by proving insubstantial dilution. We hold that proof of dilution, considering the totality of the circumstances, must be substantial in order to overcome the state's interest in linkage established here. As a matter of law, Texas' interest cannot be overridden by evidence that sums to a marginal case. It will take more to create a fact issue for trial. We must examine the circumstances in each county accordingly.

We do not now attempt to define in detail what sort of proof of dilution would be substantial enough to override the state's linkage interest. We do not change the nature or usual means of proof. The *Gingles* prerequisites and *Zimmer* factors remain. Two facts are especially relevant to assessing the substantiality of the plaintiffs' proof of dilution. One is the willingness of the racial or ethnic majority--in this case, white voters--to give their votes to minority candidates. The other critical fact is the ability of minority voters to elect candidates of their choice even when opposed by most voters from the majority. Among the *Zimmer* factors, proof of racial appeals in elections, non-responsiveness of elected officials to minority voters, and persistent lack of electoral success by minority candidates are most important.

VI. Application of Law to Each County

We now turn to the application of these principles of law in each county. As we have explained, the district court's findings of dilution are infected by erroneous legal principles. Findings that rest upon erroneous views of the law must be set aside. *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S. Ct. 1781, 1789 (1982). Remanding for reconsideration is inappropriate where "the record permits only one resolution of the factual issue." *Id.* at 292, 102 S. Ct. at 1792. Here, under controlling law, the evidence will not support the findings of liability. Our analysis is common to all counties but takes us along different routes in different counties. In the six counties of Dallas, Tarrant, Travis, Midland, Ector, and Lubbock, we hold that the district court clearly erred in finding vote dilution. Even if the district

court were correct, the evidence would be outweighed by the State's substantial interest in linkage. Finally, partisan voting at the least so weakens the proof of dilution that it loses in the weighing of the totality of the circumstances. Even if we assume that some dilution may be inferred, in the three remaining counties the evidence does not outweigh the State's interest in the totality of the circumstances.

One thread runs throughout the plaintiffs' case in all of the counties--an insubstantiality of proof that the minority-preferred candidate lost "on account of race." Except in Dallas County, the district court's finding of dilution rested on three recitations: (1) the *Gingles* prerequisites; (2) an invocation of a general history of discrimination; and (3) the number of minority judges was not proportional to the general minority population. The size of some counties and the absence of single shot voting were seen as "enhancing" *Zimmer* factors. The district court also found two instances of racial appeals in Dallas County, one in a judicial race won by the minority with white support.

A. *Dallas County*

Plaintiffs proceed on behalf of black voters in Dallas County. The voting age population of Dallas County is 1,106,757. Of this number, 180,294 (16.3%) are black. There are thirty-six different district courts in Dallas County. Until 1987, none of the judges of these districts were black. In 1987 and 1988, three of the district judges, or 8.3% of the total, were black. In 1989, there were two black district judges in Dallas County, 5.5% of the total. Today, five of the thirty-seven[36] district judges in Dallas (13.5%) are black. County court judges are also elected at-large in Dallas County; two of those judges are black. Undisputed expert testimony and surveys showed that less than 2.0% of the lawyers in Dallas County are both eligible to serve as district judges and black.

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[36]Another district court was added by the legislature.

The evidence in Dallas County clearly establishes that judicial elections are decided on the basis of partisan voting patterns. We are left with the inescapable conclusion that plaintiffs have failed to prove that minority-preferred judicial candidates in this county are consistently defeated by racial bloc voting. This is a failure to meet the threshold showing required by *Gingles*.

Uncontroverted evidence demonstrates that 99% of black Dallas voters support the Democratic candidate in every judicial election. The evidence also indicates that the majority of white voters always voted for the Republican, and thus for candidates other than the black-preferred Democratic candidate. As a result of these voting patterns, the black-preferred Democratic candidate always lost in judicial elections, regardless of the year of the election in Dallas County. The Republican Party dominated every analyzed judicial race. Defendants understandably contend that the defeat of black-preferred candidates is the result of party affiliation rather than racial considerations. According to defendants, elections are determined by straight-party voting in which voters support their party's ticket regardless of the race of the candidates. The undisputed facts overwhelmingly support this contention. Plaintiffs offer the only answer they have--the evidence is not legally relevant.

Drs. Engstrom and Taebel, plaintiffs' and defendants' experts respectively, analyzed seven district court general elections with black candidates. The following table summarizes the experts' analyses, in particular the amount of support from white voters received by each candidate. The first figure represents the "non-black vote" as estimated by plaintiffs' expert. The range is defined by the homogenous precinct and bi-variate regression analysis performed by Engstrom. The second figure, in parentheses, represents the white vote as estimated by Taebel. Taebel did not analyze the 1984 Tinsley-Maloney race.

Table VI.A

Year	Court	Candidates	Race	Party	Non-black (white) vote
1980	191st District	Winn	B	D	38.6-39.7% (36%)
		Howell	W	R	
1984	Crim Dist Ct 2	Baraka	B	R	60.6-61.8% (61%)
		Metcalfe	W	D	
"	Crim Dist Ct 4	Tinsley	B	D	28.7-30%
		Maloney	W	R	
"	301st District	White	B	D	30.6-31.9% (31%)
		O'Donnell	W	R	
1986	195th District	Tinsley	B	D	36.6-37.5% (31%)
		Kendall	W	R	
"	256th District	Wright	B	R	70.6-71.7% (77%)
		Brin	W	D	
1988	95th District	Oliver	B	D	36.9-37.9% (38%)
		Brown	W	R	

Roughly 61%-77% of white voters consistently supported Republicans, even when black Republicans ran against white Democrats. Virtually all black voters supported the Democratic candidate, even when the Democratic candidate was white, running against black Republicans.

Black Republicans won in two of the seven analyzed district court races. According to Taebel's study, one of these Republicans, Carolyn Wright, did better among white voters than any other Republican, white or black, winning 77% of the white vote. Other black Republicans received percentages of the white vote comparable to those received by white Republicans. Judge Baraka, the other black Republican district court candidate, took about 61% of the white vote against a white Democrat. County Judge Brashear, another black Republican running at-large against a white Democrat, took 66% of the white vote in his successful race for a county court judgeship.

Just as black Republicans did as well or better than white Republicans, black Democrats also won as large a percentage of the white vote as white Democratic candidates. The white vote for Democratic candidates ranged between 23% and 39%. According to plaintiffs'

exhibits, black Democrat Oliver won about 38%--a larger than average share of the white vote for a Democrat. Winn, another black Democrat, received almost four out of ten white votes. By comparison, white Democrat Brin received no more than 29% of the white vote when running against Wright, a black Republican.

Republican candidates lost the black vote and won the white vote regardless of their public positions on matters related to race. Judge Wright, for instance, had been a member of the Dallas Chapter of the Coalition of 100 Black Women; served as a legal intern for the Lawyers' Committee on Civil Rights, a project related to civil rights in South Africa; and was a charter member and past vice-chair of the National Political Congress of Black Women. By contrast, the record is silent regarding the record of her white Democratic opponent, Brin. Brin nevertheless won the black vote handily in the general election. At the same time, an overwhelming number of white voters supported Wright.

Dr. Champagne, an expert called by defendants, testified that this voting pattern was the result of straight-ticket voting. According to Dr. Champagne, judicial elections are low-profile elections in which the voters know little more about the candidates than what they read on the ballot. The voters, therefore, will make their choice based upon the information that the ballot contains--party affiliation. Because a majority of voters in Dallas County are Republican, Republican candidates prevail in most of the judicial races.

We are unable to find the requisite presence of race in this data. The undisputed facts permit no conclusion but that the defeat of black-preferred candidates was the result of the voters' partisan affiliation. The black-preferred candidate was always the Democratic candidate, while the majority of white voters always supported the Republican candidate. It is significant to the probe for racial influences that 30% to 40% of the white electorate supported Democratic candidates, although the combination of black and white Democratic votes was insufficient to carry the

Democratic candidate. The point is that a black Democratic voter and a white Democratic voter stand in the same position. Both are unable to elect the Democratic judicial candidate they prefer.

We repeat. The race of the candidate did not affect the pattern. White voters' support for black Republican candidates was equal to or greater than their support for white Republicans. Likewise, black and white Democratic candidates received equal percentages of the white vote. Given these facts, we cannot see how minority-preferred judicial candidates were defeated "on account of race or color." Rather, the minority-preferred candidates were consistently defeated because they ran as members of the weaker of two partisan organizations. We are not persuaded that this is racial bloc voting as required by *Gingles*.

Plaintiffs contend that the Democratic Party better represents the political views of black voters in Dallas County. This is doubtlessly the view of black voters, but it is not relevant to whether the minority-preferred candidate is defeated on account of race. To the extent that candidates preferred by black voters are consistently defeated because of their substantive political positions, they are the casualties of interest group politics, not racial considerations. This is not the harm against which § 2 protects. Section 2 protects black voters against defeat on account of race or color, not on account of political platform. *See Whitcomb*, 403 U.S. at 154-55, 91 S. Ct. at 1874-75. We are sensitive to the reality that political positions can be proxies for racial prejudice. However, where white voters support black candidates of a particular party in larger percentage than they support white candidates of the same party, there is no basis, without more, for us to conclude that the parties' political positions are proxies for racial bias.

Even assuming *arguendo* that plaintiffs have met the *Gingles* threshold by showing racial bloc voting, the totality of circumstances in the record cannot support a § 2 violation. Plaintiff-intervenors Oliver, White, and Tinsley

contend that "race considerations pervade elections in Dallas County." They support this proposition with the district court's finding that there were two instances of overt or subtle racial appeals in Dallas County elections. In one, judicial candidate Baraka was labeled a "Black Muslim" by his opponent. In another, district attorney candidate Vance printed his own and his opponent West's pictures in campaign literature, thus informing the electorate that he was a white candidate running against a black opponent. Nothing in the district court's opinion indicates that these racial appeals were anything more than isolated incidents. In the only judicial election affected by a racial appeal, Judge Baraka, the black candidate, won both the Republican primary and the general election, winning a majority of the white vote in both elections.

Oliver, Tinsley, and White also contended at trial that voting patterns in nonpartisan elections show that partisan affiliation could not explain the defeats of black-preferred candidates. Dr. Weiser, a statistician with experience in voting rights litigation, presented this data. Weiser examined seven Dallas City Council elections, a presidential primary, and referenda on public transit funding, a police-review board, and the city council structure. The district court made no findings about the data. Assuming *arguendo* that these high-profile elections had any relevance to voting patterns in low-profile judicial elections, the data presented do not support plaintiffs' argument. For example, although Weiser emphasized that black city council candidate Williams drew 27% and 7% of the vote in the most predominantly black and white precincts, respectively, the fact remains that his opponent Rucker won a majority of the black vote and the election. Other black-preferred candidates, such as Strauss in 1983, prevailed in three of the other six city council elections Weiser studied. In the 1984 Democratic presidential primary, Jesse Jackson won a plurality (46%) of the Dallas vote. Simply put, these nonpartisan elections do not demonstrate the consistent defeat of minority-preferred candidates. To the contrary,

the evidence shows that black-preferred candidates won a majority of the white vote and the election in most cases.

Extending our compass to the totality of circumstances fails to bring evidence that racial politics played any role in the defeat of black-preferred candidates. The district court rejected the suggestion that the Republican Party is a white slating organization. Testimony shows that any eligible candidate could run as a Republican, regardless of race. The plaintiff-intervenors testified themselves that they had been heavily lobbied by the Republican Party leadership to run on the Republican ticket. Running as Republicans, the great likelihood is that these former district judges would have been elected, as plaintiff-intervenors conceded at trial.

The plaintiffs presented general evidence of the lingering effects of past discrimination, but offered no specific evidence of depressed levels of black political participation such as low black voter registration or turnout. On the contrary, the minority-preferred candidates ran professional, well-financed campaigns backed by the Democratic Party, a party that, until the late 1970's, had dominated Dallas County judicial races just as completely as the Republican Party now dominates those races. These Democratic candidates lost because Dallas County shifted from being a county of predominantly Democratic straight-ticket voters to a county of mostly Republican straight-ticket voters.

Plaintiffs made no factual riposte to the overwhelming evidence that election outcomes were the product of partisan affiliation. Rather, plaintiffs' answer was the legal assertion that the effect of partisan affiliation, virtually admitted, is not relevant. Plaintiffs' expert, Engstrom, conceded that there is "a stronger association between partisan affiliation and success than there is between the race of the candidate and success," while clinging to the assertion that partisan affiliation does not explain all of the voting patterns in Dallas County. Finally, he conceded that he had no data that black Democrats

generally did worse than white Democrats. In fact, the undisputed facts show that, when one controls for party, black candidates did as well as, *or better than*, white candidates in winning the white voter and elections. Plaintiff-intervenor White conceded that partisan affiliation determined her electoral defeat in 1984. She admitted that "if I ran as a Republican . . . the likelihood is that I would win."

In short, the facts demonstrate that partisan affiliation, not race, was responsible for the defeat of the minority-preferred candidate in Dallas County. The district court erred in finding racial vote dilution and a violation of § 2.

— B. *Harris County*

Harris County elects 59 district judges at-large. Three are black, three are Hispanic, and the rest are Anglo. One black county court judge also was elected at-large. Uncontested expert testimony and surveys establish that black lawyers make up at most 3.8% of the eligible lawyers, but comprise 5.1% of Harris County's district judges. According to plaintiffs' evidence, 1,685,024 people of voting age reside in Harris County; 305,986 (18.2%) are black, and 222,662 (13.2%) are Hispanic. Plaintiffs claim to represent all black voters in Harris County.

The district court found a § 2 violation based on the three *Gingles* prerequisites, two primary *Zimmer* factors, and three "enhancing" *Zimmer* factors. The primary *Zimmer* factors were (1) the general history and lingering effects of past discrimination and (2) the small number of successful black judicial candidates. The enhancing *Zimmer* factors were (1) the large size of Harris County; (2) the prevention of single shot voting by numbered post election; and (3) the majority runoff requirement in primary elections. Defendants contend that, under the proper legal standards, the evidence before the district court amounts at best to a weak case of dilution that is clearly outweighed by Texas' interest in linkage. We agree.

Defendants argue that the district court's

determination that Harris County district court elections were characterized by legally significant racial bloc voting rests on two fundamental departures from controlling law. They maintain that the district court erred in (1) refusing to consider evidence demonstrating that divergent voting patterns among black and white voters were attributable to partisan affiliation and (2) excluding elections in which the black-preferred candidate was Hispanic despite overwhelming evidence that Harris County black and Hispanic voters were a cohesive group within the meaning of § 2. In light of our previous discussion, these contentions plainly have merit.[37]

Engstrom studied only 17 district court elections involving black candidates. Taebel studied 45 Harris County judicial elections between 1980 and 1988 with either a black or Hispanic candidate, including 24 district court elections, 9 county court elections, one court of appeals election, one Supreme Court election, and ten primary elections. Taebel examined all but two of the elections analyzed by Engstrom. Including the 42 races listed in Judge Wood's exhibits, the

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[37]The Houston Lawyers' Association maintains that the district court properly refused to consider elections in which black and Hispanic voters gave their united support to Hispanic candidates. The Association does not deny that black and Hispanic voters uniformly supported the same candidates in virtually every election analyzed, thus making them a cohesive group under our precedents. Rather, it objects to our examination of these races on the more general grounds that "minorities protected by the Voting Rights Act are not interchangeable" and that the success of Hispanic candidates "does not tell us anything about the willingness of white voters to support African American candidates." These objections, of course, go directly to the rule permitting the aggregation of different racial and ethnic minorities itself rather than its application to the facts of this case. We do not understand either the Association or any other plaintiffs to challenge the validity of this general rule. Nevertheless, as we demonstrate below, the weight of Texas' linkage interest precludes the finding of a § 2 violation even if these Hispanic-white elections are excluded.

record before the district court contained a total of 45 general elections that involved minority candidates. Forty of these were indigenous district or county court elections.[38]

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[38] Table VI.B

Indigenous judicial elections (Harris County)

1. candidate listed first prevailed
2. bold indicates black-preferred candidate
3. * indicates race Engstrom studied
4. ✓ indicates victory by black-preferred candidate

Year	*Court*	*Candidates*	*Race*	*Party*	
1980	80th District*	McAfee	W	R	
		Bonner	B	D	
"	309th District	Zimmerman	W	R	
		Hinojosa	H	D	
"	County Crim Ct 6	Musselwhite	W	R	
		Muldrow	B	D	
1982	157th District	**Salazar**	H	D	✓
		Powell	W	R	
"	208th District*	**Routt**	B	D	✓
		Arnold	W	R	
"	262d District*	Shaver	W	R	
		James	B	D	
"	281st District*	Moore	W	R	
		Ward	B	D	
"	308th District	**Robertson**	W	D	✓
		Leal	H	R	
"	County Crim Ct 6	Musselwhite	W	R	
		Muldrow	B	D	
"	County Crim Ct 9	**Leal**	H	D	✓
		Kolenda	W	R	
1984	80th District*	Powell	W	R	
		Berry	B	D	
"	178th District*	Harmon	W	R	
		Jackson	B	D	
"	215th District*	Chambers	W	R	
		Lee	B	D	
"	339th District	Lanford	W	R	
		Salinas	H	D	
"	County Civil Ct 3	Hughes	W	R	

(continued...)

[38](...continued)

		Hobson	B	D	
1986	133d District*	McCorkle	W	R	
		Plummer	B	D	
"	157th District	**Salazar**	H	D	✓
		Wittig	W	R	
"	180th District	Lykos	W	R	
		Guerrero	H	D	
"	185th District*	**Walker**	B	D	✓
		Godwin	W	R	
"	209th District	McSpadden	W	R	
		Sanchez	H	D	
"	232d District	**Azios**	H	D	✓
		Youngblood	W	R	
"	245th District*	**Schuble**	W	D	✓
		Proctor	B	R	
"	281st District*	Moore	W	R	
		Berry	B	D	
"	308th District	**Robertson**	W	D	✓
		Dodier	H	R	
"	County Civil Ct 3	**Hobson**	B	D	✓
		Hughes	W	R	
"	County Crim Ct 3	**Duncan**	W	D	✓
		Irvin	B	R	
"	County Crim Ct 4	Anderson	W	R	
		Williams	B	D	
"	County Crim Ct 9	**Leal**	H	D	✓
		Powell	W	R	
"	County Crim Ct 11	**Mendoza**	H	D	✓
		Pickren	W	R	
"	County Crim Ct 13	Atkinson	W	R	
		Fitch	B	D	
"	County Crim Ct 14	Barclay	W	R	
		Fisher	B	D	
"	County Probate Ct 4	McCullough	W	R	
		Lee	B	D	
1988	80th District*	Powell	W	R	
		Berry	B	D	
"	133d District*	McCorkle	W	R	

(continued...)

As in Dallas County, voters' preferences were strongly influenced, if not dictated, by partisan affiliation. The black-preferred candidate in Harris County, regardless of race, was always the Democratic candidate. For white voters, party affiliation always trumped race in predicting which candidates would be supported. The Republican candidate always won the white vote, generally taking between 55% and 65%, whether the Republican candidate was black, Hispanic, or Anglo. Similarly, Democratic candidates always took almost all black and Hispanic votes, even when a white Democrat ran against a black or Hispanic Republican.

Both the exhibits and expert testimony indicated that party, not race, was the decisive factor in determining electoral outcomes. For example, when white Democrat Schuble defeated black Republican Proctor in a 1986 district court race, Proctor won the majority of the white vote, but lost more than 95% of the black vote to Schuble. Likewise, when Irvin, another black Republican, ran for a county court judgeship against white Democrat Duncan, Irvin won the white vote while Duncan received virtually all of the black vote. Kenneth Hoyt, now a United States District Judge, won the white vote and the election in his bid for the state

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[38](...continued)

		Plummer	B	D	
"	152d District*	O'Neill	W	R	
		Fitch	B	D	
"	179th District	Wilkinson	W	R	
		Guerrero	H	D	
"	215th District*	Chambers	W	R	
		Jackson	B	D	
"	295th District*	Downey	W	R	
		Lee	B	D	
"	333d District*	Wilson	W	R	
		Spencer	B	D	
"	351st District	**Salinas**	H	D	✓
		Pruett	W	R	

appellate bench against a white Democratic opponent in 1984. Yet despite the endorsement of the Houston Lawyers' Association, Judge Hoyt lost virtually all of the black vote.

It is against this backdrop of straight-ticket voting that the limited success of black-preferred candidates described by Engstrom must be assessed. Engstrom limited his study to elections involving black candidates. Since the black-preferred candidate often is not black, this precluded Engstrom from determining whether whites in Harris County consistently voted as a bloc to defeat black-preferred candidates, as he admitted at trial. Engstrom also excluded judicial elections with Hispanic candidates and races for seats on the county court, which are also conducted on a county-wide basis.

The black-preferred candidate won only two, or 11.8%, of the 17 district court elections analyzed by Engstrom. Ten of these losses by black Democrats, however, occurred in 1980, 1984, and 1988, when popular Republican presidential candidates helped Republican judicial candidates to defeat virtually all of their Democratic opponents. The victors included Judge Hoyt, a black candidate running as a Republican. As Engstrom conceded, white and black Democrats alike were "wiped out" during these years.

The fortunes of Harris County Democrats, and thus black voters, improved considerably in 1982 and 1986, when either Governor Mark White or Senator Lloyd Bentsen headed the Democratic ticket. As in the Republican years of 1980, 1984, and 1988, success at the top of the ballot carried down to judicial races marked more by anonymity than name identity. Thus, black-preferred candidates won more than a third of the indigenous judicial races in which black candidates participated--5 out of 14, or 35.7%. Considering elections with Hispanic candidates, black-preferred candidates won 13 out of 24 indigenous judicial elections, or 52.4%. Narrowing the focus to district court races, black voters elected the candidate of their choice 8 out of 14 times. In these years, the black-preferred

candidate for district judge won in 57.1% of the elections studied. Even when the results of the lean years of 1980, 1984, and 1988 are included, we find that the black-preferred candidate prevailed in 14 out of 40 (35%) of all indigenous judicial elections with minority candidates. The record also indicates that black-preferred candidates won three out of five exogenous races for appellate and Supreme Court seats during these years.

Plaintiffs insist, however, that partisan affiliation cannot explain all of the results in this case, for in years not dominated by the Republican Party, black Democrats enjoyed less success than other Democrats. In the 1982 district court contests, white and Hispanic Democrats won 12 of 14 races, while black Democrats won only one of three. In 1986, black Democrats won two of eight indigenous judicial races; the success rate of white Democrats is not found in the record. Engstrom stated, without discussing the supporting data, that between 1980 and 1988, white Democratic candidates enjoyed a better success rate than their black counterparts.

This evidence may reflect a preference among white Democrats for white and Hispanic rather than black candidates. Plaintiffs' assertion that race is at work, however, is contradicted by the success of black candidates in the Democratic primary, where party affiliation plays no part. An exhibit introduced by Houston Lawyers' Association shows that black candidates won 9 of 16, or 56.3%, of the contested primary races. This showing detracts from the force of plaintiffs' claim.

The proof of vote dilution is marginal. The undisputed facts show that a majority of white voters invariably supported black Republican candidates, suggesting that the defeat of minority-preferred candidates was largely, although not entirely, attributable to partisan affiliation. Moreover, black voters were consistently able to elect representatives of their choice, even when they were opposed by a majority of white voters. The record indicates that black-preferred candidates prevailed in 14 out of 40

non-exogenous elections in which either black or Hispanic candidates participated--35% of the time. Limiting the inquiry to district court races, black-preferred candidates still won in 9 of 28 races, or 32.1%.

Black voters could, therefore, repeatedly elect candidates of their choice, even when opposed by a majority of white voters. Far from being submerged in a white majority, black voters were a potent electoral force that could form coalitions with minorities of white voters to elect their preferred candidates. This ability to form coalitions and influence the elections of *all* judges in Harris County would be lost in the system of single-member districts proposed by the plaintiffs. Instead, black voters might control the election of perhaps ten judges, abdicate any right to vote for the remaining forty-nine, and thus radically reduce the chances of having disputes affecting them decided by a judge they had any hand in electing. A similar observation can be made in the other counties but is strikingly apt in this large urban environment.

The remaining evidence adds little to plaintiffs' claims of illegal vote dilution. Plaintiffs offered little evidence that past discrimination and socioeconomic disparities between blacks and whites hindered the ability of black residents of Harris County to participate in the political process. In particular, there was no suggestion at trial of a lower-than-average voter registration or turnout rate among black citizens. In addition, the evidence indicated that disproportionate levels of poverty within the black community had no effect on the ability of black judicial candidates to raise the funds necessary to compete on a county-wide basis. At trial, Bonnie Fitch testified, without elaboration, that a few black incumbents experienced some difficulty in obtaining financing for their campaigns, but she attributed these problems to "racial discrimination" and the candidates' "past record of losing." Even if this isolated, equivocal testimony could somehow be construed to suggest that a lack of resources among black residents hindered black candidates' campaigns, it was

sharply contradicted by the accounts related by Jackson and Berry, two black judicial candidates. They testified that they were each able to raise sufficient funds and that they in fact outspent their white Republican opponents by ratios exceeding ten-to-one. In light of this evidence, the district court's finding that the effects of past discrimination hampered the black community's access to the political process was clearly erroneous.

Likewise, the representation of blacks on the Harris County bench cannot support an inference of racial politics. Three blacks are district judges--5.1% of the total. By contrast, black attorneys make up at most only 3.8% of the eligible lawyers in Harris County. The fact that blacks constitute a smaller percentage of the district judges than of the county population is therefore not surprising. If judges were chosen at random from the pool of eligible candidates, there would be fewer black district judges on the Harris County bench.

Aside from the number of black judges and the general history of discrimination, the district court found three *Zimmer* enhancing factors. *See Nevett v. Sides*, 571 F.2d 209, 218 (5th Cir. 1978). Such factors enhance the opportunity of a white majority to engage in racial politics. They do not, however, "meaningfully advance the inquiry into whether race is at issue," *Terrazas v. Clements*, 581 F. Supp. 1319, 1346 n.26 (N.D. Tex. 1983) (three-judge panel), and therefore do not support an inference of racial politics in Harris County.

The circumstantial evidence of a relation between black voters' electoral losses and race is, at best, tenuous, given the willingness of white voters to support black Republican candidates and the consistent success enjoyed by black-preferred judicial candidates. Even if the considerable success among black-preferred Hispanic candidates is discounted, the evidence presented at trial hardly sums to the level of dilution that might outweigh Texas' substantial interest in linking a trial judge's jurisdiction with her electoral base. Given the undisputed evidence that nearly all

of the losses suffered by black candidates occurred in years when virtually the entire party slate went down in defeat and plaintiffs' negligible showing under the *Zimmer* factors, the claim before us reduces itself to a contention that Texas' 143-year-old electoral scheme must be dismantled in Harris County because a few black candidates--most of them recently-appointed incumbents--failed to attract decisive support from white voters within the Democratic Party. We express no opinion as to whether this minimal proof of dilution might establish a violation of § 2 absent the substantial state interest. Even assuming that it would, we conclude as a matter of law that plaintiffs' proof at best produces only a marginal case in Harris County, too insubstantial to survive the weighing of the totality of the circumstances particularly so if any appreciable weight is given the linkage interest.

C. *Tarrant County*

There are 23 district courts in Tarrant County. From 1985 to 1988, three of these judges (13.0%) were black. As of 1989, two district judges are black (8.7%). The defendants' undisputed evidence indicates that only 2.4% of the eligible Tarrant County lawyers are black. There are 613,698 residents of voting age in Tarrant County. Of this number, 63,851 (10.4%) are black. Plaintiffs proceed on behalf of black voters in Tarrant County.

The evidence indicates that blacks voted cohesively for the Democratic candidate. Dr. Brischetto, plaintiffs' expert for this county, analyzed four elections: three general elections for district judgeships and the 1988 Democratic presidential primary. In all four elections, the regression estimates show that from 85% to 100% of black voters in Tarrant County supported the black-preferred, Democratic candidate. Taebel's analysis similarly shows cohesion.

Taebel analyzed nine general elections, including three exogenous elections, in which a black or Hispanic had participated. These included five district court races, one county court race, two Supreme Court races, and a contest for Texas Attorney General. Brischetto analyzed only four

elections, in which black candidates had participated. As in all other counties, the evidence shows consistent black support for Democratic candidates. The following tables summarize the analyzed races involving black or Hispanic candidates. For each black-preferred candidate, the estimated percentage of the white vote is listed. These are based upon Taebel's estimates, except those in parentheses, which reflect Brischetto's regression and homogenous precinct analyses. A "check" mark indicates a victory by the black-preferred candidate.

Table VI.C
Indigenous judicial elections (Tarrant County)

Year	Court	Candidates	Race	Party	White Vote	
1982	233d District	Valderas	H	D	36%	✓
		Hines	W	R		
"	County Crim Ct 4	Perez	H	D	48%	✓
		Lynch	W	R		
1986	233d District	Weaver W	R			
		Valderas	H	D	40%	
"	Crim Dist Ct 1	Sturns B	R			
		Goldsmith	W	D	43% (51-56%)	
"	Crim Dist Ct 4	Drago	W	D	45% (54-59%)	✓
		Salvant B	R			
1988	Crim Dist Ct 2	Dauphinot	W	R		
		Davis	B	D	40% (42-50%)	

Exogenous elections (Tarrant County)

Year	Court/Office	Candidates	Race	Party	White Vote	
1986	Attorney General	Barrera	H	R		
		Mattox	W	D	39%	
"	Supreme Court Pl 4	Bates	W	R		
		Gonzalez	H	D	38%	
"	Supreme Court Pl 3	Gonzalez	H	D	46%	✓
		Howell	W	R		
1988	Dem Pres Primary	Jackson	B		(14-16%)	
		Dukakis	W			
		Gore	W			
		Gephardt	W			
		Hart	W			
		Simon	W			

Unlike other counties, black judges occupied more than 13% of the district judgeships in Tarrant County for four out of five years--a proportion of the bench that is greater than the proportion of black voters in the county's population.

The success of black-preferred candidates was also greater in Tarrant County than elsewhere. In those general elections with black candidates, the black-preferred, Democratic candidate won only one out of three general elections--33.3% of the studied races. However, in nine general elections with either black or Hispanic candidates included in Taebel's study, the black-preferred candidate won four out of nine, or 44.4% of the elections. In the six indigenous district and county court elections studied, the black-preferred candidate won three out of six, or 50% of the elections. These figures do not indicate the consistent defeat of black-preferred candidates.

The district court, by contrast, found that the black-preferred candidate was consistently defeated in Tarrant County. The district court reached this conclusion by ignoring elections in which Hispanics had participated. This rejection of white-Hispanic elections was erroneous. The undisputed facts, as reflected by Taebel's exhibits, are that a majority of Hispanic voters always supported the same candidate favored by black voters in every general election. The district court found that Hispanic and black voters were cohesive in Midland, Lubbock, and Ector Counties on similar evidence. With virtually identical proof in Tarrant County, the same conclusion must follow, and we hold that it does.

Brischetto included the 1988 Democratic presidential primary in which Jesse Jackson won virtually all of the black vote in Tarrant County, but only between 14% and 16% of

the white vote.[39] Defendants exhibits include a 1986 Democratic primary for district court in which Ross, the black-preferred candidate, received 57% of the black vote, but lost the white vote and thus came in third out of a field of four candidates. Those exhibits show, however, two other Democratic primaries--ignored by Brischetto--in which black-preferred Hispanic candidates prevailed.[40]

In short, the evidence shows that the black-preferred candidate won 40% of the Democratic primaries and half of the indigenous judicial elections studied, including the elections with Hispanic candidates. The record also shows that black judges have consistently made up a greater proportion of district judges in Tarrant County (13.0%) than the proportion of black voters in the county's population (10.4%), and far more than the proportion of eligible black attorneys (2.4%).

Furthermore, the undisputed evidence shows that black candidates won as great a share of white votes as white candidates, if we control for party affiliation. For instance, Sturns, a black Republican with a long history of involvement in civil rights and black community organizations, won 57% of the white vote to beat a white Democrat. Salvant, another black Republican, also won a majority (55%) of the white vote, although he lost his race for a district judgeship to a white Democrat supported by a combination of black voters, Hispanic voters, and white Democrats. Black Republicans also won the same share (50%) of elections as white Republicans among the races

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[39]We note that there were five other viable Democratic candidates (Dukakis, Gore, Gephardt, Hart, and Simon) in the 1988 primary, so that Jackson could expect to receive only 16.7% of the white vote if that vote were randomly distributed.

[40]Taebel's exhibits also include a 1982 county court primary that the black-preferred candidate, Hicks, seemed to win by seven votes. This tabulation, however, was based upon elections returns prior to a recount under which Hicks apparently lost.

with black or Hispanic candidates.

Finally, blacks have not been underrepresented on the Tarrant County bench. Plaintiffs' exhibit indicates that, for four out of the five years studied, three of Tarrant County's district judges were black; for these four years, while blacks made up only 10.4% of the county's voting age population, more than 13% of the relevant office holders were black. Given this persistent and substantial black presence on the Tarrant County bench, the consistent and substantial success of minority-preferred candidates, and the absence of any evidence of racial politics in Tarrant County, we conclude that, even if the plaintiffs had proven the *Gingles* prerequisites, the district court clearly erred in finding illegal vote dilution under the totality of circumstances. This is so even if we ignore the fact that blacks and Hispanics voted cohesively in Tarrant County and exclude the races with Hispanic candidates from our analysis. Looking at just the district court general elections involving black candidates, the black-preferred candidate won 33.3% of the time. In light of the evidence just discussed, which excluding Hispanic elections does not change, reducing the relevant success rate from 44.4% to 33.3% is insignificant in the totality of the circumstances. There is no case as a matter of law in Tarrant County.

D. *Travis County*

There are 13 district judges elected in Travis County. From 1985 to 1988, one of them was Hispanic, or 7.7% of the total. This judge was defeated in 1988. Hispanic lawyers make up 2.7% of the eligible lawyers in the county. There are 312,392 voting age residents in Travis County, which encompasses Austin, Texas. Of them, 44,847 (14.4%) have Spanish surnames. Only 29,067 (9.3%) are black. The district court found that a "minimally contiguous," predominantly-Hispanic judicial district could be created. Plaintiffs proceed on behalf of Hispanic voters in Travis County.

Plaintiffs' witnesses stated that the Republican Party is insignificant in Travis County and the proper testing

ground for candidates is the Democratic primary. Plaintiffs analyzed three Democratic primary elections: one for district court and two for county court positions. Defendants analyzed eleven elections: four exogenous general elections, including one state senate, one Attorney General, and two Supreme Court races; four exogenous primary elections, including one state senate, one Supreme Court, and two appellate court primaries; and finally the same three indigenous judicial elections studied by plaintiffs.

By Taebel's analysis, the Hispanic-preferred candidate won all four of the exogenous general elections. In three of the four, the Hispanic-preferred candidate also won a majority of the Anglo vote. In addition, the Hispanic-preferred candidate won two exogenous primaries, for Supreme Court and state senate. Thus, the Hispanic-preferred candidate prevailed in two of the four (50%) exogenous primaries and two of the seven (28.6%) primaries studied overall. Altogether, the Hispanic-preferred candidate won 54.5% of the indigenous and exogenous elections analyzed.

The district court found, however, that the three indigenous primary elections for judicial positions were "closer in nature to District Court elections" and sufficed to show a pattern of racial bloc voting sufficient to defeat the Hispanic-preferred candidate. The district court therefore relied solely on the three elections analyzed by both Taebel and Brischetto to find that the Hispanic-preferred candidate lost 100% of the time.

In the one district court and two county court primary elections analyzed by the parties, the Hispanic, and Hispanic-preferred, candidate was defeated by a white majority. In one of these races, however, white voters gave their support to a black candidate, and thereby defeated both the Hispanic Castro and Hughes, a white candidate. Kennedy, the black candidate, had the overwhelming support of black as well as white voters, so it is difficult to conclude that Castro was defeated by a white bloc. Castro and Hughes were defeated by a black-white coalition. Thus,

Castro's defeat is not evidence of the white majority's ability "usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 106 S. Ct. at 2766-67.

The two remaining indigenous primary elections offer a meager base for liability. The plaintiffs' case reduces to three facts: (1) Hispanic-preferred candidates Gallardo and Garcia gained only 33% to 37% of the Anglo vote in 1988 Democratic primaries, and failed to win nominations for district and county court elections; (2) only one Hispanic, Gallardo, served as district judge between 1985 and 1998, while no Hispanic now serves; and (3) Hispanics have suffered from past discrimination in Travis County. We conclude that the district court clearly erred to find illegal vote dilution on this record.

In finding clear error, we repeat Justice Brennan's admonition that "the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election." *Gingles*, 478 U.S. at 51, 106 S. Ct. at 2767. It defies common sense to believe that the loss of two primary races in one year constitutes usual and predictable defeat by a white bloc, rather than simply "loss of an occasional election." However, assuming *arguendo* that these two elections constitute sufficient proof of the third *Gingles* prerequisite, they are too meager to prove dilution under the totality of circumstances, as a matter of law.

The plaintiffs contend that Hispanics are underrepresented among district judges in Travis County. Hispanics made up 7.7% of those judges in four out of five recent years, while making up no more than 2.7% of the lawyers eligible under Texas law to fill those posts. Given such a small pool of qualified candidates, it is not surprising that Hispanics have made up a small proportion of the Travis County bench. This result need not be attributed to the interaction of racial bias with the at-large electoral scheme. It is equally likely that the numbers reflect the limited candidate pool. Plaintiffs can point to only one district court election that an Hispanic candidate lost--Gallardo's race in 1988. Even if Gallardo had prevailed, the

percentage of Hispanic judges would not have increased, because Gallardo was the one Hispanic sitting before 1988. While we do not require that any minority candidates run for the office in question, the court cannot ignore this reality while plaintiffs emphasize the absence of minority office holders.

Far from signalling the submergence of minority voting strength by an interaction of electoral process and bias, the undisputed facts indicate that Travis County's political system is open to Hispanic and white candidates alike. Hispanics won half of the four exogenous primary elections studied, including races for the state senate, appellate courts, and Supreme Court. The Hispanic-preferred candidate also won all four of the general elections analyzed by the defendants. The City of Austin contains most of Travis County's population. As this court noted in *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989):

> Austin has repeatedly elected black and Mexican-American council members during the past 17 years. . . . [T]he winning minority candidates frequently received well over fifty percent (50%) of the Anglo vote and were also the preferred candidates of the minorities. Minority candidates have routinely been elected to other posts in Austin and the surrounding Travis County.

Likewise, the defendants here produced evidence that Hispanic county commissioners had been elected from predominantly Anglo districts and won Anglo districts, and that Trevino, a Hispanic Austin city council member, had been elected in city-wide elections. Against this background, which includes the success of state Senator Barrientos and Justice Gonzalez and other Hispanic-preferred candidates, plaintiffs' minimal case is plainly insufficient to prove illegal vote dilution. The district court clearly erred in finding otherwise.

E. *Bexar County*

The voting age population of Bexar County is 672,220. Of these, 46,767 (7.0%) are black, and 278,577 (41.4%) are Hispanic. Nineteen district judges are elected from Bexar County. Of this number, five (26.3%) are Hispanic. Undisputed evidence shows that 11.4% of the eligible lawyers in Bexar County are Hispanic. Plaintiffs proceed on behalf of Hispanic voters in Bexar County.

Plaintiffs and defendants analyzed the six district court general elections with Hispanic candidates between 1982 and 1988. Defendants also studied a 1980 general election with an Hispanic candidate, as well as two appellate court and three county court general elections with either Hispanic or black candidates. As in every other county, Hispanics voted cohesively for the Democratic candidate while a majority of Anglos supported the Republican candidate.

In the twelve judicial elections studied, the Hispanic-preferred Democratic candidate won four times, 33.3%. The Republican candidate usually won the general election, and always won the Anglo vote, regardless of the candidate. The four Democratic victories were: (1) the 1980 appellate court race between Murry and Esquivel; (2) the 1980 district court race between Prado and Priest; (3) the 1988 district court race between Bowles and Mireles; and (4) the 1988 county court race between Patterson and Canales. Priest, an Anglo Democrat, beat Prado, an Hispanic Republican, while Esquivel, Mireles, and Canales, all Hispanic Democrats, defeated their Anglo Republican opponents.

Partisan affiliation does not explain, however, the voting patterns in Democratic primary elections. By defendants' own evidence of Democratic primaries in Bexar County, the Hispanic-preferred candidate lost in nine of fourteen elections, prevailing only 35.7% of the time, when Anglo Democrats voted for the Hispanic candidate's Anglo opponent. Anglo support for the Hispanic candidate was seldom above 30% and as low as 1%--whereas the Hispanic vote for the Hispanic-preferred, and always Hispanic,

candidate was above 70% for five of the nine unsuccessful candidates. Plaintiffs' as well as defendants' experts agreed, however, that primary elections do not provide a reliable guide where, as here, both parties are competitive, since they involve only a fraction of the electorate.

Partisan affiliation accounts for much of the voting patterns analyzed by the parties. Most Anglo voters are Republicans; most Hispanic voters are Democrats. Anglo voters gave a majority of their votes to Republicans, and Hispanic voters gave a majority of their votes to Democrats, even when Hispanic Republican candidates faced Anglo Democratic opponents. Prado and Barrera, Hispanic Republicans, won 70% and 86% of the Anglo vote respectively, when running against Anglo Democratic opponents who received the overwhelming majority of the Hispanic vote. Any proof of dilution is meager at best and cannot overcome Texas' substantial linkage interest as a matter of law.

Because Hispanic voters make up more than 41% of the population, they can elect Democratic candidate with minimal Anglo support and have done so repeatedly. The minority-preferred candidate won four out of twelve elections in which an Hispanic candidate participated--33.3% of the time--with as little as 17% of the Anglo vote. Hispanic voters are plainly a potent political force that can elect candidates by forming coalitions with small percentages of Anglo voters. If Bexar County were subdistricted, Hispanic voters might elect a few more of their preferred candidates, but only at the expense of losing their influence over the majority of Bexar County judges. The perversity of such a result is self-evident.

Finally, the evidence that elections were affected by racial politics preventing the formation of such coalitions is thin. It consisted solely of (1) evidence of low Hispanic voter registration; (2) the usual enhancing factors present in every Texas county--anti-single shot voting and the majority runoff requirement; and (3) the fact that Hispanic judges occupy five of nineteen district judgeships--26.3% of the

total--while Hispanics make up 41.4% of Bexar County's voting age population. Again, we note that Hispanic attorneys make up only 11.4% of the eligible bar, so that the representation of lawyers on the bench is actually higher than would be produced by random selection from the pool of eligible candidates. This evidence, even if probative in the abstract, is as meager as the evidence in Harris County.

The evidence compels the conclusion that any dilution was marginal and cannot as a matter of law survive the weighing of the totality of the circumstances when Texas' substantial state interest is added to the mix. If Texas' linkage interest does not outweigh this evidence of dilution, the state's interest would be a nullity. We hold that plaintiffs' proof fails in Bexar County as a matter of law.

F. *Jefferson County*

Eight district judges are elected from Jefferson County. The record shows that no black judge was elected there between 1985 and 1989.[41] Expert evidence establishes that fourteen eligible attorneys in Jefferson County, 3.1% of the qualified bar, are black. The voting age population of Jefferson County is 179,708. Of this number, 44,283 (24.6%) are black. Plaintiffs proceed on behalf of black voters in Jefferson County.

Taebel testified that Jefferson County is the most Democratic of the targeted counties, with 90% of its voters participating in the Democratic primary. Brischetto analyzed eight primary and runoff elections, including the 1988 Democratic presidential primary. Taebel analyzed six exogenous elections involving either black or Hispanic candidates: four primaries and two general elections. Unlike their other studies, Brischetto and Taebel analyzed

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[41]Since trial, district judges in Jefferson County have filed an *amicus* brief requesting judicial notice that Davis, an African-American, was elected to the county court in 1990. The *amicus* brief also notes that black Democrat Overstreet and Hispanic Democrat Morales won a majority of the county's votes in their respective 1990 races for Court of Criminal Appeals and Attorney General.

totally different elections.

In all but one of the primary elections studied by Brischetto, the black vote was cohesive. In one case, the candidate with the greatest black support received a high plurality (47%) of the black vote. A majority of white voters always opposed the black-preferred candidate in the primary elections.

Whether the black-preferred candidate was consistently defeated by a white bloc is a close question. The answer varies with the elections counted and how they are counted. Defendants point to four primaries. In two elections, black candidate Price won the nomination for state representative. In two others, for Supreme Court and Court of Criminal Appeals, black-preferred Hispanic candidates Gonzalez and Martinez participated. Gonzalez won the Jefferson County Democratic vote; Martinez did not. Defendants also rely on two exogenous general elections, for Supreme Court and Attorney General, involving Hispanic candidates Gonzalez, a Democrat, and Barrera, a Republican. In both general elections, the black-preferred candidate--Gonzalez and Mattox, Barrera's Democratic opponent--prevailed.

Plaintiffs offer five indigenous primaries, ranging back to 1972, in which black candidates participated--four for justice of the peace and one for county court. They also submitted the exogenous 1988 presidential primary. Among these six races, the black-preferred candidate prevailed only once, when Jackson won a plurality in the 1988 presidential primary.

The total of eight elections analyzed by Brischetto includes both the initial primaries and subsequent runoffs for justice of the peace in 1972 and 1974. In the initial primaries, black-preferred candidate Freeman failed to win the highest plurality. Plaintiffs would count these results as "defeats" separate from Freeman's subsequent defeat in the runoffs. Freeman won, however, the second highest number of votes in the initial primaries and thus made those runoffs. We do not consider Freeman's showings in the initial

primaries to be separate from the runoff elections. Thus, the record reflects four justice of the peace elections, not six.

Unlike Tarrant County, defendants' evidence does not include estimates of how Hispanic residents in Jefferson County voted. There are no facts showing that Hispanic and black voters were politically cohesive in Jefferson County. Anglo-Hispanic elections are entitled to less weight than white-black races in determining the success of black-preferred candidates.

Nonetheless, confining our consideration to the analyzed elections in which black candidates participated, we must conclude that the plaintiffs failed to prove a substantial case of dilution. The plaintiffs and defendants together produced evidence of eight primary elections in which a black who was also the black-preferred candidate participated. The black-preferred candidate won three primaries out of these eight elections--a success rate of 37.5%. All three of the black-preferred candidates' victories were exogenous: Jackson won the 1988 presidential primary, while Price won two Democratic primaries for state representative.

As in every county but Dallas, the district court found no sign of racial appeals. Likewise, there is no finding of non-responsiveness on the part of elected officials to the concerns of black constituents. Enhancing factors as well as past discrimination were shown, but--as elsewhere--were not brought home to this case. The minority-preferred candidate prevailed in every general election submitted by the parties.

The plaintiffs' case was further weakened by their use of dated statistics: three of the five indigenous elections they submitted were held in 1972, 1974, and 1978. There is no evidence of a practical and searching appraisal of contemporary conditions in Jefferson County. *See Nipper v. Chiles*, 795 F. Supp. 1525, 1540 (M.D. Fla. 1992) (noting limited probative force of "stale" elections).

We have here no more than marginal proof of illegal vote dilution. The evidence is inadequate to prove that

black voters were denied an equal opportunity to participate in the political process. It is too insubstantial to survive a weighing of the totality of circumstances when the state's substantial linkage interest is added to the mix. As a matter of law, the state's interest outweighs this case.

G. *Midland County*

Midland County contains 82,636 voting age residents, of whom 6,893 (11.9%) have Spanish surnames and 4,484 (7.8%) are black. There are three district judges in Midland County; none are Hispanic or black. Undisputed evidence shows that seven Hispanic and three black attorneys are eligible for district judgeships. They comprise 3.2% of the lawyers eligible to run for that office. Plaintiffs proceed on behalf of both Hispanic and black voters in Midland County.

Plaintiffs analyzed three general elections in Midland County. Two of them were exogenous races for the Texas Supreme Court. The third was an indigenous race involving a black candidate for a Justice of the Peace position in 1986. Defendants likewise examined Gonzalez's bids for the Supreme Court in 1986 and 1988, as well as four primary elections in which either a black or Hispanic candidate participated. Defendants also analyzed the Mattox-Barrera race for Texas Attorney General.

Both parties' analyses show that the majority of Anglo voters always opposed the candidate preferred by the geographically compact and cohesive combined minority population in the general elections. The minority-preferred candidate was always defeated by this Anglo majority.

We conclude that the district court clearly erred in finding dilution. The undisputed facts indicate that partisan affiliation, not race, caused the defeat of the minority-preferred candidate. The majority of minority voters always cast their votes in favor of the Democratic candidate. The Anglo voters cast the majority of their votes for the Republican, regardless of the race of the candidates. Indeed, Barrera, the Hispanic Republican candidate for Attorney General, won 76% of the Anglo vote when running against Mattox, a white Democrat--the second highest vote

received by any of the Republicans in the analyzed general elections. Because Republican voters outnumbered Democratic voters, the minority-preferred Democratic candidate consistently lost. The plaintiffs have not established the third prerequisite of *Gingles*.

Even if plaintiffs could meet the *Gingles* threshold, the totality of circumstances does not add up to dilution. The plaintiffs can show only a general history of discrimination and a lack of minority judges. These facts prove little. In Midland County, only one minority lawyer has run for local office (county attorney), and none has ever run for a district judgeship. These low numbers reflect the minuscule number of eligible minority candidates. According to the evidence, only ten minority lawyers are eligible to run for the district court seat.

Because the undisputed facts show that partisan affiliation uninfected by racial politics caused the minority-preferred candidates' defeat, we hold that the district court erred in finding dilution.

H. *Lubbock County*

Lubbock County residents vote for five district court positions. None of these five judges are black or Hispanic. The surveys introduced by the defendants indicate that 23 Hispanic lawyers in Lubbock County are eligible to run for the district court. The surveys show that no black residing in the county is eligible to do so. The total voting age population is 150,714. Of this number, 22,934 (15.2%) have Spanish surnames and 9,509 (6.4%) are black. Plaintiffs proceed on behalf of the combined Hispanic and black voters in Lubbock County.

None of the parties analyzed indigenous elections in Lubbock County; no minority has ever run for a position on the district court. Plaintiffs analyzed two exogenous primaries and two exogenous general elections, for the Supreme Court and for the Court of Criminal Appeals. Defendants studied the same two general elections, adding an exogenous general election for Attorney General.

Plaintiffs' and defendants' evidence shows that blacks

and Hispanics tend to vote cohesively. There is also no dispute that the majority of Anglo voters did not support the candidate favored by the minority voters in Lubbock County in any of the elections studied.

As in Dallas and Midland Counties, however, the undisputed facts show that, in general elections, partisan affiliation and not racial politics caused the consistent defeat of the minority-preferred, always Democratic, candidates. The data indicate that, in these counties, over 60% of white voters supported the Republican candidate, while most minority voters supported the Democratic candidate. As a result of this voting pattern, the Democratic and minority-preferred candidate consistently lost to a Republican opponent, regardless of the ethnicity of the candidates.

In the 1986 and 1988 races for the Supreme Court, Hispanic Democrat Gonzalez lost Lubbock County's vote to white Republican opponents. However, in the contest for Attorney General, Barrera, an Hispanic Republican, defeated Mattox, a white Democrat. Like Gonzalez's Republican opponents, Barrera took a majority of the Anglo votes, while his white opponent took a majority of the minority votes. In short, as in Midland County, the evidence establishes that voting patterns in Lubbock County were unaffected by the race of the candidates. Rather, they resulted from party loyalty. Therefore, plaintiffs have not met the third *Gingles* factor.

The plaintiffs point to two exogenous Democratic primary elections for state appellate and Supreme Court positions.[42] However, the minority-preferred candidate won a majority of the votes cast in one of these two elections. Although Martinez was defeated, Gonzalez won a majority

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[42] As we stated in the discussion of Jefferson County, *supra* Part VI.F, we hold that the runoff election subsequent to a primary election is a single election for the purposes of computing the success or failure of the minority-preferred candidate. The victor of the runoff election is the victor of the combined primary/runoff race.

of the votes cast in the Lubbock County Democratic primary for the Supreme Court. These primary races, therefore, do not indicate that the minority-preferred candidate was consistently defeated within the meaning of *Gingles*, and they cannot establish dilution.

I. *Ector County*

There are four district judges in Ector County. All of them are Anglo. There are fewer than 200 lawyers in the county. Surveys estimate that no more than six of them are black or Hispanic and eligible to become district judges. Ector County, whose principal city is Odessa, has 79,516 voting age residents. 14,147 (17.8%) are Hispanic, while 3,255 (4.1%) are black. Plaintiffs proceed on behalf of the combined minority population in Ector County.

The parties relied on the same exogenous races in Ector County that they produced in Lubbock County. The plaintiffs examined primary and general elections for appellate courts involving Martinez and Gonzalez. The defendants added Barrera's bid for Attorney General.

The undisputed facts indicate that the minority-preferred, Democratic candidates were consistently defeated in general elections by an Anglo majority voting for their Republican opponents. In the Democratic primaries, Martinez won a majority of the vote. The minority-preferred candidate won half of the Democratic primary races and therefore was not consistently defeated in the primaries.

As in Lubbock County on virtually identical facts, we find that the district court clearly erred in finding racial vote dilution. The undisputed facts indicate that partisan affiliation controlled the outcomes of the general elections. As in Lubbock County, while Hispanic Democratic candidates lost the Anglo vote, Barrera, a Hispanic Republican, won a majority of the Anglo vote running against his white Democratic opponent Mattox.

While partisan affiliation would not explain polarization in the primaries, the facts indicate that the minority-preferred candidate was not consistently defeated

by racial polarization in the primary elections. Rather, Martinez won one of the two races analyzed. Plaintiffs have failed to meet the third prerequisite of *Gingles*.

VII. Conclusion

We would expect over time that the Texas judiciary would reflect the black and Hispanic population eligible to serve--if judges, for example, were drawn from a pool of all persons eligible to serve. In truth, minority lawyers fare better than we would expect from a random process. We do not suggest that because they fare better than they would in a system of random selection, voting rights of blacks and Hispanics could not have been illegally diluted. Rather, the observation is relevant because it brings perspective to this battle by drawing borders around its asserted implications and deflating overdrawn invocations of large wrongs of history, unremedied and unanswered.

There is no disparity between the number of minority judges and the number of minorities eligible to serve. Rather, the only disparity is between the minority population and minorities eligible to serve as judges. Much can be said about that--of deficits in education and other social shortchangings of black and Hispanic persons. To those who push judicial entry onto this larger field we must answer that our task is more narrowly drawn--to decide if *voting* rights have been denied. We lack the authority, even if we had the wisdom, to do more. The Voting Rights Act is not an unbridled license--to explore for example the persistent low enrollment of black law students. One small example. This year the law school at Louisiana State University graduated the largest number of black students in its history. This followed intensive recruiting efforts including the inducement of a free education--with stipends. Of the several hundred students graduated, ten were black. This sad story can be repeated at school after school. We are told that this is not relevant. We think that it is.

We decline to reach for social questions beyond the Voting Rights Act by recasting its meaning and purpose. Ultimately, we cannot escape the steely truth that we cannot

arrive at sound answers if we fail to ask the right questions. We think that today we have asked the correct questions and answered them as best we can.

REVERSED.

JONES, Circuit Judge, with whom JOLLY, SMITH, BARKSDALE and DeMOSS, Circuit Judges, join in concurring in majority opinion:

Judge Higginbotham's excellent opinion resolves all but one of the issues in dispute between the parties, and I am pleased to concur in it as far as it goes. The single issue that I believe should have been discussed is whether different racial or language minority groups may be permitted to aggregate their strength in order to pursue a Section 2 vote dilution claim. Permitting such a black/Hispanic coalition claim was vital to plaintiffs' success in three counties in this case. The issue was preserved for appeal, albeit as an aside to the all-pervasive issues;[1] it furnishes an alternate ground of decision in the three counties. I believe the *en banc* court should lay to rest the minority coalition theory of vote dilution claims.[2]

Congress did not authorize the pursuit of Section 2 vote dilution claims by coalitions of distinct ethnic and

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[1] Although the *en banc* majority opinion *adopts* the minority coalition theory for certain aspects of its analysis, those points are not essential to its result and simply demonstrate that the plaintiffs' own arguments are self-contradictory.

[2] The Supreme Court has acknowledged but not addressed the minority coalition theory. *Growe v. Emison*, ___ U.S. ___, 113 S. Ct. 1075, 1085 (1993). Judge Higginbotham has twice advocated *en banc* consideration of this issue. *See League of United Latin American Citizens v. Midland I.S.D.*, 812 F.2d 1494, 1503-09 (Higginbotham, J. dissenting), *aff'd in part on other grounds*, 829 F.2d 564 (5th Cir. 1987) (*en banc*); *Campos v. City of Baytown, Texas*, 849 F.2d 943 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing *en banc*). In neither case, for procedural reasons, did the court acquiesce. I endorse Judge Higginbotham's earlier writings.

language minorities. What Congress did not legislate, this court cannot engraft onto the statute. Except in two eccentric decisions from Texas, the coalition theory has found no factual support anywhere else in the federal courts. The crucial problem inherent in the minority coalition theory, articulated by Judge Higginbotham and realized in this case, is that it transforms the Voting Rights Act from a statute that levels the playing field for all races to one that forcibly advances contrived interest-group coalitions of racial or ethnic minorities.

According to customary legal analysis, there should be no need to discuss the minority coalition theory of vote dilution because the text of the Voting Rights Act does not support it. The Act originally protected only black voters. When it was amended in 1975 to reach language minorities, the Act then identified four new covered groups: persons of Spanish heritage; all American Indians; "Asian Americans" including Chinese, Japanese, Korean and Filipino Americans; and Alaskan natives. 42 U.S.C. § 1973(b)(f)(1). That each of these groups was separately identified indicates that Congress considered members of each group and the group itself to possess homogeneous characteristics. By negative inference, Congress did not envision that each defined group might overlap with any of the others or with blacks. *See* Hunter, The 1975 Voting Rights Act and Language Minorities, 25 Cath. U.L. Rev. 250, 254-57 (1986); Katherine I. Butler and Richard Murray, Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?, 21 Pac. L.J. 619, 624-25 (1990) (hereafter, "Butler and Murray").

The 1982 amendment to Section 2, which codified the "results" test, likewise offers no textual support for a minority aggregation theory. It speaks only of a "class of citizens" and "a protected class." 42 U.S.C. § 1973(b). Had Congress chosen explicitly to protect minority coalitions it could have done so by defining the "results" test in terms of protected *classes* of citizens. It did not.

Two arguments have been made for extending the Voting Rights Act to minority coalitions. First, one appellate panel stated, without citation or further reasoning, that the Act does not *prohibit* such claims. *Campos v. City of Baytown, Tex.*, 840 F.2d 1240, 1244 (5th Cir.), *reh'g denied*, 849 F.2d 943 (5th Cir. 1988), *cert. denied*, 492 U.S. 905, 109 S. Ct. 3213 (1989). The Act does not prohibit claims by minorities from the Indian subcontinent either. But as Judge Higginbotham pointed out, this is answering the wrong question. The proper question is whether Congress *intended to protect* coalitions. *Campos*, 849 F.2d at 945 (Higginbotham, J. dissenting from denial of reh. *en banc*). "The fact that both groups are protected does not justify the assumption that a new group composed of both minorities is itself a protected group," Butler and Murray, *supra*, at 647. Judge Higginbotham explained the distinction:

> In deciding to protect language minorities, Congress recognized that language and racial minorities share many disabilities. To assume, however, that a group composed of both minorities is itself a protected minority is an unwarranted extension of congressional intent. A group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition.

840 F.2d at 945.

The second argument advanced by a court that permitted a minority coalition claim under Section 2 begs the question of statutory construction altogether. This position asserts that because a minority coalition may meet the three-prong *Gingles* test, including the criterion of the minority group's political cohesiveness, it may gain relief from vote dilution.[3] This argument was successful in a

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[3] A general citation to *Thornburg v. Gingles*, the Supreme Court's decision on vote dilution, is superfluous at this point in our court's writing.

Texas case in which, paradoxically, the court also acknowledged that *Gingles* says nothing about the possibility of granting relief to minority group coalitions.[4] Previously, it had rejected a plan offered by the plaintiffs that contained a mixed black/Hispanic district, because it found the interests of these two minorities too divergent to justify their submergence in one district. Nevertheless, it predicated a new, inexplicably opposite finding on *Gingles'* second prong and determined that the coalition of blacks and Hispanics was politically cohesive. *League of United Latin American Citizens v. Midland Indep. Sch. Dist.*, 648 F. Supp. 596, 606 (W.D. Tex. 1986).[5] Again, Judge Higginbotham noted the court's error in purporting to rely on *Gingles*:

> [*Gingles'*] three-step inquiry *assumes* a group unified by race or national origin and asks if it is cohesive in its voting. If a minority group lacked common race or ethnicity, cohesion must rely primarily on shared values, socioeconomic factors, and coalition formation, making the group almost indistinguishable from political minorities as opposed to racial minorities.

Midland, 812 F.2d at 1504. Reliance on *Gingles* is false

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[4] Butler and Murray, *supra* at 642, observe that before the *Midland* case, blacks and Hispanics had pursued Voting Rights Act cases together, but they had sought separate districts or relief for each minority.

[5] The court's finding on political cohesiveness was supported only by this:

. . . Blacks and Hispanics worked together and formed coalitions when their goals were compatible. Additionally, the bringing of this lawsuit provides evidence that blacks and Hispanics have common interests that induce the formation of coalitions. *Id.*

Butler and Murray term "shocking" the court's reliance only on the facts that suit has been brought jointly and that the minority groups are willing to work together to accomplish "compatible" goals. Butler and Murray, *supra* at 667.

because *Gingles* does not address the meaning of or solution to vote dilution of a minority coalition.

A principal reason for distinguishing homogeneous, explicitly defined minority groups from minority coalitions lies in Section 2 itself. One may be uncertain what Congress might think about permitting minority coalitions to assert vote dilution claims, but Congress clearly walked a fine line in amending Section 2 to codify the results test for vote dilution claims while expressly prohibiting proportional representation for minority groups. The results test of vote dilution inherently recognizes that a minority group will sometimes fail to merit a single member district solely because they lack the population to "constitute a majority in a single member district." *Gingles*, ___ U .S. ___, 106 S. Ct. at 2766 and n.17. Permitting Section 2 claims by opportunistic minority coalitions, however, artificially escapes this hurdle. As a result, the remedy afforded to the coalition may easily cross the line from protecting minorities against racial discrimination to the prohibited, and possibly unconstitutional, goal of mandating proportional representation.[6]

The tension in Section 2 between the results test and the prohibition of proportional representation fundamentally distinguishes this case from *Chisom v. Roemer*, ___ U.S. ___, 111 S. Ct. 2354 (1991), in which the Supreme Court concluded that judicial elections are covered by Section 2.

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[6] The *Midland* case illustrates this point. The district court approved a "remedy"

in the form of the best available single member district to each of the *two* groups, even though neither could satisfy [*Gingles*'] requirements of size and compactness. . . . Ironically, Section 2, which specifically disavows a right to proportional representation, was used to provide greater than proportional representation for two groups, *neither of whom would have qualified for a seat had proportional representation actually been the law.*

Butler and Murray, *supra*, 667-68 (emphasis added).

Stating that certain types of elections are within Section 2 is a definitional exercise. In *Chisom*, the Court held that judicial elections, having once been covered by the Act, remained covered following the 1982 amendment to Section 2. But it is a remedial exercise to decide whether to apply the results test to a minority coalition united not by race or language but only by their desire to advance a particular agenda. Enlarging the permissible boundaries of Section 2 relief to encompass minority coalitions thus runs headlong into the Section 2 prohibition of proportional representation, creating a conflict that the Supreme Court did not face in *Chisom*.

If Section 2 is held to permit relief for minority coalitions, the complications for Voting Rights Act litigation in our increasingly multi-ethnic society will be enormous. Those complications alone imply that Congress rather than the courts should first address any such innovation. Certain questions should give pause even to the advocates of minority coalitions. As Judge Higginbotham observed, the availability of a minority coalition theory could be a defense against an attack on an at-large system. *Campos v. City of Baytown, Texas, supra* 849 F.2d at 945-46 (Higginbotham, J.). Where the combined groups comprise more than half of a voting population in a plausible single-member district, their "cohesion" could be used as a device to "pack" the minorities together. Further, on what basis would a court apportion districts in the wake of a successful minority coalition Section 2 suit? If each minority is given an opportunity to prevail in a district, is this not an admission that the coalition is ephemeral and not really "cohesive" as *Gingles* requires? Is it possible that greater racial animosity will develop if a court permits minority aggregation on too insubstantial a basis and effectively submerges members of one group in a district controlled by the other group? Courts should be loath to embark upon coalition redistricting with no expressed guidance from a statute that reflects the will of the American people.

If, notwithstanding the absence of Congressional

authorization, minority coalitions are permitted to assert aggregate Section 2 vote dilution claims, relief must be predicated on more evidence of the group's homogeneity than the maintenance of a joint lawsuit. See note 5, *supra*. This is so for two reasons. As noted earlier, if a fortuitous coalition of minorities can gain Section 2 relief on tenuous proof of cohesion, the courts will have effectively undone Congress's explicit disapproval of proportional representation. The less cohesive the groups truly are, the more likely relief has been fashioned only because of the groups' joint minority status. Second, there is risk to members of the minority groups themselves if their electoral fates are joined even though they do not share fundamentally similar social and political goals. To be sure, the problem of determining minority political cohesiveness under *Gingles* may be difficult even when the claims of one minority group are at issue.[7] But it should be self-evident that the problem is compounded when different minority groups, with radically different cultural and language backgrounds, socioeconomic characteristics and experiences of discrimination seek Section 2 coalition status. Forcibly merging fundamentally different groups for the purpose of providing "minority" representation could be a cruel hoax upon those who are not cohesive with self-styled minority spokesmen.

The difficulty of proving vote dilution on behalf of coalitions of minorities has been vividly realized in practice. Except in the *Midland* and *Campos* cases, there appear to be no reported decisions in which sufficient proof of the minority coalition theory was adduced to justify Section 2 relief. The theory has been litigated all over the country, but it has repeatedly been rejected on factual grounds. *See Concerned Citizens of Hardee County v. Hardee County Bd. of*

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[7] *See, e.g.*, Butler and Murray, 651-57, 674-87, describing the diverse socioeconomic and ethnic qualities among our Hispanic population.

Commissioners, 906 F.2d 524 (11th Cir. 1990); *Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739, 744 (D.C. Mass. 1985) *aff'd*, 784 F.2d 409 (1st Cir. 1986); *Butts v. City of New York*, 614 F. Supp. 1527, 1546 (D.C. N.Y. 1985), *reversed on other grounds*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021, 106 S. Ct. 3335; *Badillo v. City of Stockton*, 956 F.2d 884, 886 (9th Cir. 1992); *Romero v. City of Pomona*, 665 F. Supp. 853, 859 (D.C. Cal. 1987), *aff'd*, 883 F.2d 1418 (9th Cir. 1989). *See also Nixon v. Kent County, Michigan*, 790 F. Supp. 738 (W.D. Mich. 1992) in which Judge Enslen, author of a well-known constitutional law treatise, thoughtfully concluded that the only proper test for minority aggregation is whether two minority groups "are indeed one." 790 F. Supp at 743.[8] Even in Texas, before this case, the success of the *Midland* and *Campos* plaintiffs was unique. *See Overton v. City of Austin*, unpublished, 1987, *aff'd*, 871 F.2d 529 (5th Cir. 1989) (rejecting black/Hispanic coalition case in part because evidence showed that each group voted for candidates of their own race but not for candidates of the other race.)

What this string of defeats suggests, if not the utter bankruptcy of Section 2 minority coalition claims, is at least their factual complexity. Once the courts plunge into the business of apportioning representation among racial or ethnic coalitions, a host of difficult and potentially divisive social questions rear their heads. A finding of political

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[8] The court in *Nixon* looked to the following factors, gleaned from the definition of minority group:

(1) Whether the members have similar socioeconomic backgrounds resulting in common social disabilities and exclusion;

(2) whether members have similar attitudes toward significant issues affecting the challenged entity;

(3) whether members have consistently voted for the same candidates; and

(4) whether the minorities consider themselves "one" even in situations in which they would benefit independently.

Nixon at 790 F. Supp. 744.

cohesiveness should require such coalitions to prove, at the very minimum, not only that they usually vote for the preferred candidates of their own ethnic group but also for those of the coalition group -- otherwise, the groups cannot be politically cohesive. Not only do most of the above-cited decisions case doubt on such a proposition, but considerable sociological literature also demonstrates "social distance" between minority groups that seems inconsistent with widespread coalition minority political cohesion.[9]

The second panel opinion in this *Lulac* case concedes that

> the procedure of allowing Blacks and Hispanics to proceed as a "coalition" minority group in a Section 2 claim is fraught with risks.

Lulac II, 986 F.2d 785, n.43. Ironically, while citing the Butler and Murray article to which I have referred, the panel makes no use of its cautionary data or its conclusion:

> Proponents of coalition dilution suits argue that minority groups are natural allies because of their shared exclusion from the dominant society, and their similar lower socioeconomic status, which, proponents maintain, is a product of past discrimination. Despite the simplistic logic of this position, it does not comport with the reality revealed by social science studies. Those studies suggest just the opposite. The rarity of documented political alliances between minority groups is the natural consequence of differences in their attitudes and perceptions. Studies indicate that minorities in fact identify more closely with the dominant group than with other minorities. Moreover, perceptions of

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[9] *See, e.g.*, Dyer, Dedlitz and Worochel, Social Distance Among Racial and Ethnic Groups in Texas, Some Demographic Correlates, 70 Social Science Quarterly 607, 613-14 (1989); Donald L. Horowitz, "Conflict and Accommodation: Mexican Americans Need Cosmopolis" in *Mexican Americans in Comparative Perspective* 58, 84-92 (1985) *See also* Butler and Murray, *supra* n.7.

> discrimination vary widely among groups. Blacks, for example, are much more likely than Mexican Americans to perceive themselves to be victims of discrimination. Still other studies suggest that the underlying causes of lowered socioeconomic status differ among minority groups. Different root causes of poverty are likely to lead to different, possibly even conflicting, demands on the government.

Butler and Murray, *supra*, 688-89. Butler and Murray contend that because of these differences, minority coalitions "very seldom" ought to be able to prove vote dilution under Section 2. Butler and Murray, *supra* at 687. The short answer to plaintiffs' joint Section 2 claims in Lubbock, Ector and Midland Counties is that they did not meet their burden of proof that blacks and Hispanics are sufficiently like a single minority group to entitle the coalition to one judicial district in each county.

Conclusion

The Congressional compromise that resulted in the passage of Section 2 left the field of voting rights wide open to courts in many respects. Congress did not, however, contemplate or authorize relief for coalitions of racial and language minority groups. For the courts to provide such relief, in my view, judicially amends the Act and flies in the face of the express prohibition of proportional representation in Section 2. At the very least, only under very convincing proof of a minority coalition's sociological similarities and goals as well as its political cohesion can such a claim be made. In this case, plaintiffs have not carried their burden of proof concerning Lubbock, Midland or Ector Counties. Our court's previous decisions in *Midland* and *Campos* must be overruled. With these additional observations, I concur in the majority opinion.

POLITZ, Chief Judge, with whom, JOHNSON, KING and WIENER, Circuit Judges, join, dissenting:

I respectfully dissent. The parties have moved for remand of this action to the district court for consideration

of a proposed settlement. Remarkably, the majority denies that motion despite the fact that our jurisprudence long has favored settlement as the preferred mode of dispute resolution,[1] permitting avoidance of unnecessary monetary and emotional costs and the risks attendant in all litigation.[2] We have long recognized that the parties to an action "have a right to compromise their dispute on mutually agreeable terms."[3] There is nothing about this action against the State of Texas that would warrant abrogation of that well-established rubric.[4] The Governor and Attorney General, joined by a majority of both houses of the Texas Legislature, have made manifest their desire to compromise this action. In its headlong rush to reach the merits, the majority suggests no persuasive, much less compelling, reason for the jettisoning of the preferred manner of dispute resolution. I

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[1]*Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *see also, e.g., Carson v. American Brands, Inc.*, 450 U.S. 79, 86-88 (1981) (potential loss by parties of opportunity to settle constitutes "serious, perhaps irreparable, consequence" of district court's refusal to enter consent decree making such ruling immediately appealable); *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154 (5th Cir. 1985); *In re Chicken Antitrust Litigation*, 669 F.2d 228 (5th Cir. Unit B March 1982); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *cf.* Fed. R. Civ. P. 68 (recipient of settlement offer must pay costs incurred after receipt where judgment ultimately obtained is not as good as offer); Fed. R. Evid. 408 (evidence of good faith settlement negotiation inadmissible as proof of liability or claim value at trial).

[2]*Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528-29 (1986); *United States v. City of Miami*, 664 F.2d 435, 439 (5th Cir. 1981) (*citing United States v. Armour & Co.*, 402 U.S. 673 (1971)) (en banc) (plurality opinion).

[3]*City of Miami*, 664 F.2d at 440.

[4]*See Chisom v. Edwards*, 970 F.2d 1408 (5th Cir. 1992) (granting joint motion to remand to effectuate settlement in Louisiana voting rights case).

would grant the motion to remand.

Stripped to essentials, the majority asserts that Attorney General Morales lacks authority to settle this matter on behalf of the State because of the opposition by Chief Justice Phillips and Judges Entz and Wood. I find this nothing short of incredible. This action challenges the scheme for election of district judges in Texas. The real party in interest herein is the State of Texas.[5] As its chief legal officer, the Attorney General "has broad discretionary power in conducting his legal duty and responsibility to represent the State,"[6] including authority to propose and execute settlement agreements in reapportionment cases.[7] That is what the Attorney General seeks to do in this case.[8]

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[5]The State is the real party in interest in an action against one of its officials in her official capacity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). The plaintiffs here named as defendants the Governor of Texas, the Attorney General, the Secretary of State, and the Chief Justice of the Supreme Court as chair of the Judicial Districts Board, all in their official capacities. In short, the plaintiffs have sued the State of Texas.

[6]*Terrazas v. Ramirez*, 829 S.W.2d 712, 721 (Tex. 1991) (citing Tex. Const. art. 4, § 22; Tex. Gov't Code § 402.021; further citations omitted).

[7]*Terrazas*, 829 S.W.2d at 722; *id.* at 747 (Mauzy, J., dissenting) (at least seven justices agree that "[t]he attorney general is constitutionally empowered to execute a settlement agreement in litigation challenging a legislative redistricting plan.").

[8]The majority also makes much of the fact that the consent decree allows the State of Texas to take actions which would otherwise be prohibited by state law. I do not think that consideration of the merits of the *proposed* consent decree is appropriate at this juncture. We are a court of errors; the district court should have an opportunity to conduct a hearing and determine whether to enter the consent decree before we decide the merits of such action.

(continued...)

The Attorney General has the active assent of the Governor, Lieutenant Governor, and a majority of both houses of the Texas Legislature. Pray tell, what more do we need to accept the proposed settlement as being made on behalf of the State of Texas?

That Chief Justice Phillips has voiced an objection does not alter the certainty that the State of Texas, through its authorized spokesman, wishes to settle this matter. As chairman of the Judicial Districts Board, Chief Justice Phillips has a measure of authority over judicial apportionments. We cannot ignore, however, that the Board's authority in this area —— and hence that of the Chief Justice —— is entirely subject to the will of a majority of the legislature[9] which has, albeit in a nonbinding fashion, agreed to the proposed settlement.[10] Further, the status of

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[8](...continued)

I further note that although courts generally must defer to state apportionment policy in fashioning the remedy for a violation of Section 2, district courts have equitable power to depart from state law if necessary. *See, e.g., White v. Weiser*, 412 U.S. 783, 797 (1983) (Constitution and Voting Rights Act limit judicial deference to state apportionment policy). If the court ultimately concludes that there is a reasonable factual and legal basis for finding such a violation, *see City of Miami*, 664 F.2d at 441, the exercise of such powers by way of a consent decree may be appropriate.

[9]*See* Tex. Const. art. 5, § 7a(h) ("Any judicial reapportionment order adopted by the board must be approved by a record vote of the majority of the membership of both the senate and house of representatives before such order can become effective and binding.").

[10]Chief Justice Phillips's limited authority in this area distinguishes the case at bar from *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (en banc), heavily relied upon by the majority. Unlike the district attorney in that case, who enjoyed specific authority under state law to represent the state and bring prosecutions under the statute there at issue, Chief Justice Phillips enjoys neither independent authority over judicial apportionment nor express authority to represent the state.

the Chief Justice in the Texas judiciary does not carry with it the authority to speak *ex cathedra* for the state on policy matters affecting the judiciary which are unrelated to the decisions of specific cases.[11] That the plaintiffs, probably out of an abundance of caution, joined the Chief Justice as a defendant in this action should not preclude settlement. No one may seriously suggest that this voting rights case could not have progressed to a definitive conclusion without the presence of the Chief Justice. The awesome decision to deny parties an opportunity to compromise and settle their case, much less a case as important as that here presented, must be based on a much more solid, indeed a compelling basis.

I would remand this case to the district court for consideration of the proposed consent decree.

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[11]This proposition applies equally to Judges Entz and Wood. Further, because the proposed consent decree will not affect their constituencies, Judges Entz and Wood do not gain standing to challenge the consent decree because of their status as office holders. *City of Cleveland*, 478 U.S. at 528-29; *City of Miami*, 664 F.2d at 447 ("the parties to litigation are not to be deprived of the opportunity to compose their differences by objections that find no basis in prejudice to the objector"). Finally, the majority opines that the status of Judges Entz and Wood as voters in Harris County somehow clothes them with authority to block a settlement favored by competent state authorities. While the district courts certainly should permit input from such intervenors when considering entry of a consent decree, to accord them what amounts to a veto, as the majority does, would effectively preclude settlement of *any* Section 2 litigation —— an absurd and unconscionable result which I refuse to embrace. *See City of Cleveland*, 478 U.S. at 529 ("[W]hile an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent."). Extending the majority's analysis would result in any voter being able to block settlement of any suit against the state or one of its subdivisions. That simply cannot be. *See Apache Bend Apts. v. United States*, 987 F.2d 1174 (5th Cir. 1993) (*en banc*).

KING, Circuit Judge, with whom, POLITZ, Chief Judge, and JOHNSON, Circuit Judge, join, dissenting:

The majority ably accomplishes what it set out to do in this case: reach the merits of this appeal so that it can overhaul the Voting Rights Act. Indeed, from its initial decision to deny the motion to remand filed by the Plaintiffs and the State of Texas, to its decision to reverse the district court's judgment in each of the nine target counties, the majority proceeds with a kind of determination not often seen in a judicial opinion. Like Chief Judge Politz, I believe that the parties should be given the opportunity to settle this case. I also believe that fidelity to the Voting Rights Act requires us to affirm the district court's judgment in eight of the nine target counties. Accordingly, I respectfully dissent.

The majority's decision to deny the motion to remand, even standing alone, is indefensible. It demonstrates a lack of judicial restraint and sets a bad precedent. Under the majority's reasoning, states and political subdivisions embroiled in section 2 lawsuits must now defend their electoral practices to the bitter end--unless those practices can be changed in accordance with state law and everyone who is even remotely connected with the lawsuit agrees to the proposed changes. Because these circumstances are unlikely to occur, the majority has effectively ensured that section 2 cases will rarely, if ever, be settled.

In light of the majority's seriously flawed decision on the merits of this case, however, its decision to deny the motion to remand becomes even more indefensible. In my view, the majority's discussion of the merits--complete with a declaration that blacks and Hispanics are just two more interest groups and a conclusion that blacks and Hispanics are overrepresented on the Texas district court bench--perhaps provides the best argument against its decision to deny the parties' motion to remand this case for a settlement hearing. In fact, it is only after reading the majority's decision on the merits that one can truly understand why it denied the motion to remand. For that reason, I begin with

the merits.

I. *THE MERITS*

In reversing the district court's judgment, the majority ultimately concludes that the evidence of vote dilution in this case is "marginal"--too marginal to outweigh the State of Texas' substantial interests in maintaining the current system. I disagree with this conclusion on two fronts. First, I reject the majority's assertion that the evidence of vote dilution in this case is weak. Under the established analytical framework for assessing section 2 claims, the Plaintiffs' evidence of vote dilution is anything but weak; indeed, it is only by changing the rules that the majority can so characterize the evidence in this case. I also disagree with the majority's determination that the State of Texas' interests in maintaining its current at-large election system are substantial. In my view, these interests are little more than tenuous and therefore could not outweigh even "marginal" evidence of vote dilution.

A. *The Plaintiffs' Evidence of Vote Dilution: Overhauling a Congressional Statute*

As explained in my earlier opinion, the evidence of vote dilution in this case is substantial. *See League of United Latin American Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 776-803 (5th Cir. 1993) (*LULAC III*).[1] Had this case been decided before today, the evidence in eight of the nine target counties would have pointed unerringly towards a finding of vote dilution. This evidence includes: a geographically compact and politically cohesive minority group; a white bloc vote that is usually sufficient to defeat the combined strength of minority and white crossover votes; a history of official discrimination against the minority

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[1] The panel majority opinion contains a fuller discussion of many of the issues addressed in this dissent. I have tried to avoid an overly long dissent in the hope that the reader will refer to the earlier opinion for a more complete treatment of the issues.

group; the lingering socioeconomic effects of discrimination against the minority group; structural mechanisms, including giant election districts, that tend to enhance the dilutive nature of at-large election schemes; and an appalling lack of minority representation on the district court bench.

After today, such evidence will be only "weak" evidence of vote dilution. This is because the majority has changed the analytical framework for analyzing vote dilution claims. Along the way, the majority has distorted Congressional intent, rejected Supreme Court precedent, and completely altered the focus of the section 2 inquiry. As a result of the majority's handiwork, the section 2 inquiry is no longer a *blended* one which looks to the "past and present reality" of the local political landscape. *See* S. REP. No. 417, 97th Cong., 2d Sess., at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208 [hereinafter S. REP.]. Rather, it is one that looks only at the present, although paradoxically, not at reality.

1. Altering the Racial Bloc Voting Inquiries

The most glaring example of the majority's efforts to reshape the section 2 inquiry is its redefinition of two closely-related terms--namely, "legally significant white bloc voting" under the threshold inquiry of *Thornburg v. Gingles*, 478 U.S. 30 (1986), and "racially polarized voting" under the totality of circumstances inquiry. Before today, these terms have been widely understood by lower courts, as well as by the Supreme Court, to have a descriptive meaning--a meaning that is completely in accord with section 2's focus on *results*. The majority, choosing to ignore this wide consensus, acts as if it is writing on a clean slate. That is, the majority acts as if Congress and the Supreme Court have not spoken on these issues. Because I refuse to put on such blinders, I cannot join the majority's decision to reformulate these terms.

a. *The majority's version of racial bloc voting*

The majority's formulation of "legally significant white bloc voting" under the *Gingles* threshold inquiry, as well as its view of racially polarized or racial bloc voting

under the totality of circumstances inquiry, is confusing--to say the least. The majority spends some thirty pages at the front of its opinion explaining what these two closely related terms require; yet at the end of the section entitled "Racial Bloc Voting," all the reader knows is that more is required than showing (a) with regard to legally significant white bloc voting, that minority-preferred candidates are consistently defeated by a white majority, and (b) for racially polarized voting, that minorities and whites vote differently. What more is required the majority does not expressly say.

Make no mistake about the majority opinion in this regard: it does redefine the terms of legally significant white bloc voting and racially polarized voting. To understand exactly what the majority "holds" with respect to these two terms, however, one must first go back to earlier opinions by Judge Higginbotham and then read the majority's county-by-county analysis in this opinion. It is only then that the majority's holding becomes comprehensible. Specifically, the majority holds that to establish legally significant white bloc voting and racially polarized voting, minority plaintiffs must, at the very least, negate partisan politics as an explanatory factor for the consistent defeat of their preferred candidates. The majority further implies--without deciding the issue--that minority plaintiffs may have to affirmatively prove racial animus in the electorate to meet their burden with respect to legally significant white bloc voting and racially polarized voting.

The starting point for understanding the majority's vague approach to the racial bloc voting inquiries is Judge Higginbotham's opinion in *Jones v. City of Lubbock*, 730 F.2d 233 (5th Cir. 1984) (Higginbotham, J., specially concurring from denial of rehearing). This is where he first suggested that racial bloc voting requires a showing of racial animus in the electorate. He asserted:

> The [racial bloc voting] inquiry is whether race or ethnicity was such a determinant of voting preference in the rejection of black or brown candidates by a white majority that the at-large district, with its

> components, denied minority voters effective voting opportunity.

Id. at 234. Judge Higginbotham further questioned whether racial bloc voting could be demonstrated without the use of a multivariate regression analysis, which, he argued, would eliminate other possible causes of voting behavior--such as campaign expenditures, party identification, income, media use measured by cost, religion, name identification, or distance that a candidate lived from any particular precinct. *See id.* at 234-35.

The racial animus theme was also present, albeit to a lesser extent, in Judge Higginbotham's earlier dissenting opinion in this case, where he strongly disagreed with the panel majority's definition of legally significant white bloc voting and racially polarized voting. In particular, he stated that the "consistent defeat" of minority-preferred candidates could not be "on account of race or color," as required by section 2, unless it is tied to "racial bias in the electorate." *LULAC III*, 986 F.2d at 846 (Higginbotham, J., dissenting). This, he further stated, "is the heart of section 2." *Id.*; *see also id.* at 831 ("[T]he extent to which voting patterns are attributable to causes other than race is an integral part of the inquiry into racial bloc voting . . . .").

It was also in this dissent, however, that Judge Higginbotham first advocated placing on plaintiffs the burden of "negating partisan politics" in order to show legally significant white bloc voting and racially polarized voting. That is, he appeared to retreat from his earlier, more rigid position of requiring minority plaintiffs to affirmatively establish racial animus in the electorate and instead described the plaintiffs' burden as one of negating partisan politics. *See LULAC III*, 986 F.2d at 834. At that point, he was willing to limit the "inquiry into racial bloc voting to determining whether divergent voting patterns are caused by partisan differences." *Id.*; *see also id.* at 845 ("Proof of majority voting based on party affiliation prevents the showing of bloc voting required by *Gingles*."). Thus, Judge Higginbotham's earlier position in this case was that, where

the evidence "shows that divergent voting patterns among white and minority voters are best explained by partisan affiliation, . . . plaintiffs have failed to establish racial bloc voting." *Id.* at 833-34. In short, he would have required minority plaintiffs to show that the consistent defeat of their preferred candidates was not "readily attributable to partisan affiliation." *Id.* at 834.

There are still vestiges of Judge Higginbotham's earlier positions in the majority opinion, although in the front of the opinion they are only expressed as "powerful arguments." The majority asserts, on the one hand, that it "need not hold that plaintiffs must supply conclusive proof that a minority group's failure to elect representatives of its choice is caused by racial animus in the electorate in order to decide that the district court's judgment must be reversed." Majority Opinion at 57-58. It notes, however, that a racial animus requirement could readily be inferred from the text and legislative history of section 2, as well as Supreme Court precedent. *See id.* at 58. The majority also asserts that there is "a powerful argument supporting a rule that plaintiffs[,] to establish legally significant racial bloc voting[,] must prove that their failure to elect representatives of their choice cannot be characterized as a 'mere euphemism for political defeat at the polls.'" *Id.* at 58-59. In this regard, the majority explains that "[d]escribing plaintiffs' burden in terms of negating 'partisan politics' rather than affirmatively proving 'racial animus' would not be simply a matter of nomenclature." *Id.* at 59. It notes: "A rule conditioning relief under § 2 upon proof of the existence of racial animus in the electorate would require plaintiffs to establish the absence of not only partisan voting, but also all other potentially innocent explanations for white voters' rejection of minority-preferred candidates." *Id.*

Ultimately, however, the majority *purports* not to resolve the debate between Judge Higginbotham's two earlier positions. Whether the plaintiffs' burden of proving bloc voting includes the burden of demonstrating racial animus in the electorate, or only the burden of negating

partisan politics, we are told, "the result is the same." *Id.* at 61. The district court's judgment must be reversed, according to the majority, "[b]ecause the evidence in most instances unmistakably shows that divergent voting patterns among white and minority voters are best explained by partisan affiliation"--thus leaving the Plaintiffs unable to "establish racial bloc voting." *See id.* at 64.

That the majority has reformulated the concepts of legally significant white bloc voting and racially polarized voting becomes crystal clear in its application of the law to each county. In Dallas County, for example, the majority holds that the plaintiffs have not satisfied the third *Gingles* threshold requirement. It reasons:

> The evidence in Dallas County clearly establishes that judicial elections are decided on the basis of partisan voting patterns. We are left with the inescapable conclusion that plaintiffs have failed to prove that minority-preferred judicial candidates in this county are consistently defeated by racial bloc voting. This is a failure to meet the threshold showing required by *Gingles*.

Id. at 106-07. The majority makes similarly explicit holdings in Midland, Lubbock, and Ector counties. *See id.* at 141-42 (holding that, because partisan affiliation, not race, caused the defeat of the minority-preferred candidate in Midland County elections, "[t]he plaintiffs have not established the third prerequisite of *Gingles*."); *id.* at 144 (concluding that plaintiffs have not met the third *Gingles* factor because the evidence establishes that the voting patterns in Lubbock County resulted from party loyalty, not race); *id.* 145-46 ("Plaintiffs have failed to meet the third prerequisite of *Gingles*" because the "undisputed facts indicate that partisan affiliation controlled the outcomes of the general elections."). Moreover, in Harris and Bexar counties, the majority strongly suggests that, because election outcomes appeared to result from partisan politics, the Plaintiffs could

not establish legally significant white bloc voting.[2]

Thus, although the majority's "holding" with respect to legally significant white bloc voting and racially polarized voting is confused and elusive--a paradigm of "fluidity and fixity," *see* Majority Opinion at 56--it is nonetheless a holding: Minority plaintiffs must now establish, at a minimum, that the racially divergent voting which consistently defeats their preferred candidates is not the result of partisan politics. Moreover, the majority hints that the plaintiffs' burden in this regard may even be higher. That is, minority plaintiffs may have to demonstrate that racially divergent voting patterns are due to racial animus in the electorate in order to meet their burden under the legally significant white bloc voting and racially polarized voting inquiries.

b. *Problems with the majority's version of racial bloc voting*

There are grave problems with the majority's approach(es) to legally significant white bloc voting and racially polarized voting. From a purely legal perspective, the majority's reformulation of the terms simply cannot be supported. The majority's approach is also flawed from a social science perspective. More importantly, however, the

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[2] In reversing the district court's findings of legally significant white bloc voting in the various counties, the majority relies on trivariate regression analyses submitted by the State of Texas and Judge Wood in this case--analyses which unquestionably demonstrated that a candidate's partisan affiliation was a better *predictor* of electoral success than a candidate's race. The majority does not remand this case to the district court for consideration of the statistics under the new legal standards for racial bloc voting--as might be expected under *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) (where district court's factual finding is based upon a misapprehension of law, "a remand is the proper course unless the record permits only one resolution of the factual issue"). Rather, the majority concludes that the voting statistics in this case are capable of only one interpretation--an interpretation that is severely flawed. *See infra* Part I.A.1.b(ii).

reformulation of these terms essentially eviscerates section 2 of the Voting Rights Act--at least in the context of partisan elections.

(i) *Legal problems*

The majority asserts that its definitions of legally significant white bloc voting and racially polarized voting are required by the language and legislative history of section 2, as well as Supreme Court precedent. I disagree.

This being a question of statutory interpretation, I turn first to the language of section 2. That section provides, in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class in numbers equal to their

proportion in the population.

42 U.S.C. § 1973.

The language of this section does not, under a straightforward reading, require minority plaintiffs to "negate partisan politics" or demonstrate current racial animus in the electorate. The words "partisan politics" appear nowhere in the language of section 2. And although subsection (a) does require a link--a critical link--between the denial or abridgment of the right to vote and "race or color," there is no indication that Congress used the phrase "on account of race or color" to require proof of either the absence of partisan politics or the presence of racial animus in the electorate. In fact, Congress emphasized that it used the phrase "'on account of race or color' to mean 'with respect to race or color,' and not to connote any required purpose of racial discrimination." S. REP. at 27-28 n.109, 1982 U.S.C.C.A.N. at 205-06 n.109.

Nor does the legislative history accompanying the 1982 amendments to section 2 offer any real support for the majority's new definition of legally significant white bloc voting and racially polarized voting. In a bit of fancy footwork, the majority asserts that, pursuant to the Senate Report accompanying the amended section 2, racial bloc voting is established when "race is the predominant determinant of political preference." Majority Opinion at 48. The Senate Report says no such thing. It states that, in considering the totality of the circumstances, courts should examine "the extent to which voting in the elections of the state or political subdivision is racially polarized." S. REP. at 29, 1982 U.S.C.C.A.N. at 206. Several pages later, in a section entitled "Responses to Questions Raised About the Results Test," the Senate Report reads:

> The Subcommittee Report claims that the results test *assumes* "that race is the predominant determinant of political preference." The Subcommittee Report notes that in many cases racial bloc voting is not so monolithic, and that minority voters do receive substantial support from white

voters.

> That statement is correct, but misses the point. It is true with respect to most communities, and in those communities, it would be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process under the results test.
>
> Unfortunately, however, there still are some communities in our Nation where racial politics do dominate the electoral process.
>
> In the context of such racial bloc voting, and other factors, a particular election method can deny minority voters equal opportunity to participate meaningfully in elections.

Id. at 33, U.S.C.C.A.N. at 211. This passage, from which the majority lifts its definition of racial bloc voting, simply does not *define* the term. If anything, the reference to the statement "that in many cases racial bloc voting is not so *monolithic*, and that *minority voters do receive substantial support from white voters*" reinforces my view that the racial bloc voting inquiry looks only at the extent to which minorities and whites vote differently. *See infra* Part I.A.1.c.

Even more incredible, however, is the majority's assertion that the Supreme Court's definition of legally significant white bloc voting, as set forth in Justice Brennan's opinion in *Gingles*, is still open to question. Five Justices joined the part of Justice Brennan's opinion laying out the *Gingles* threshold requirements--including the requirement that minority plaintiffs "must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 51. Moreover, contrary to the majority's assertions otherwise, five Justices also joined in Part III.B.2. of Justice Brennan's opinion, where he defined legally significant white bloc voting as "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes." *Id.* at 56.

Although there was some disagreement over the

appropriate framework for analyzing section 2 claims at the time *Gingles* was decided--specifically, from Justice O'Connor--recent Supreme Court cases confirm that the threshold test announced in Justice Brennan's majority opinion still controls. In *Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993), Justice O'Connor, writing for a unanimous Court, stated:

> In *Thornburg v. Gingles*, *supra*, this Court *held* that plaintiffs claiming vote dilution must prove three threshold conditions. First, they must show that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. Second, they must prove that the minority group is politically cohesive. *Third, the plaintiffs must establish that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.*

(emphasis added) (internal quotations omitted) (ellipsis in original). The Court similarly embraced the *Gingles* threshold test, as formulated by Justice Brennan, in *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993), another unanimous opinion.

Thus, when the majority reformulates the third *Gingles* threshold factor and requires minority plaintiffs to negate the existence of partisan politics (or possibly to prove racial animus in the electorate), it does so in the face of binding Supreme Court precedent. Moreover, even assuming that *Gingles* did not decide the question of what constitutes legally significant white bloc voting and racially polarized voting, I still cannot agree with the majority's rendition of the various opinions in the case.

The primary disagreement in *Gingles* concerned Justice Brennan's statement that "the reasons black and white voters vote differently have *no relevance* to the central section 2 inquiry." 478 U.S. at 63 (emphasis added). Justice O'Connor, writing for three other Justices, disagreed. She rejected Justice Brennan's assertion that explanations for racially divergent voting patterns "can never affect the *overall*

vote dilution inquiry," *id.* at 100 (emphasis added), and cited two examples of how such explanations might affect it. First, she noted:

> Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters *for reasons other than those which made that candidate the preferred choice of the minority group* would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates.

Id. (emphasis added). She also believed that "Congress intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without minority support would be willing to take the minority interests into account." *Id.* Contrary to the majority's assertions, however, Justice O'Connor did not "maintain[] that evidence that white and minority voters generally supported different candidates did not constitute legally significant racial bloc voting where these patterns were attributable to partisan affiliation rather than the race of the candidate." Majority Opinion at [57]. On this issue, she stated:

> Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and *to assess its prospects for electoral success*, I agree that defendants cannot rebut this showing by offering evidence that divergent racial voting patterns may be explained in part by causes other than race.

Gingles, 478 U.S. at 100 (emphasis added). This statement suggests that evidence that divergent voting patterns are explained in part by partisan affiliation will not preclude a finding of legally significant white bloc voting--a finding which bears directly on the minority group's "prospects for

electoral success."[3]

The secondary disagreement in *Gingles* concerned Justice Brennan's statement that "the race of the candidate *per se* is irrelevant to racial bloc voting analysis." 478 U.S. at 67. Justice White disagreed with this statement, as did Justice O'Connor. Specifically, they both argued that the race of the candidate is relevant to the racial bloc voting inquiry. *See id.* at 83, 101. That the race of the candidate is relevant to the racial bloc voting inquiry, however, does not translate to a requirement that minority plaintiffs must negate partisan politics or prove racial animus in the electorate in order to demonstrate polarized voting.

Finally, I must say a few words about the Supreme Court's decision in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), upon which the majority places heavy reliance. The outcome in that case--i.e., the Supreme Court's reversal of the district court's vote dilution finding--did not, in my view or in Congress' view, turn on the absence of racial bloc voting. Rather, as Congress indicated in the Senate Report accompanying the 1982 amendments to section 2, the district court's error in *Whitcomb* was finding vote dilution "on the basis of proof that black ghetto residents with dist[inct] legislative interests had been consistently underrepresented

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[3] The majority suggests that evidence that racially divergent voting patterns are attributable to partisan affiliation or perceived interests is "quite probative" on the question of whether white bloc voting will consistently defeat minority-preferred candidates. Majority Opinion at [48-49] n.26. I strongly disagree. If the "perceived interests" of minority voters lead them to vote for candidates of one political party, while the interests of a majority of whites lead them to vote for candidates of a different party, this would seem to strengthen, not weaken, the consistency with which the two racial groups would vote differently. That election results appear to be attributable to voting along party lines, then, does not suggest that other candidates, "*equally preferred by the minority group*, might be able to attract greater white support in future elections." In short, it does nothing to undercut--and may even strengthen--the consistency with which minority-preferred candidates are defeated.

in the legislature in comparison with their proportion of the population." S. REP. at 20, 1982 U.S.C.C.A.N. at 198; *see also id.* at 23, 1982 U.S.C.C.A.N. at 200 ("*Whitcomb* . . . recognized that, in order to prevail, plaintiffs had to prove more than that minority members had not elected legislators in proportion to their percentage of the population."). Also significant to the outcome in *Whitcomb*, in Congress' view, was the fact that nine blacks had won at-large elections in the time period studied in *Whitcomb*. *See id.* at 21, 1982 U.S.C.C.A.N. at 198.[4] Significantly, Congress never interpreted *Whitcomb* to require minority plaintiffs to prove that the consistent defeat of their preferred candidates is not the result of partisan politics. As explained more fully in my earlier opinion, *Whitcomb* stands for the proposition that where there is evidence of partisan voting or interest group politics *and no evidence* that members of the minority group have an unequal opportunity to participate in the political process on account of race or color, the minority group's vote dilution claim will fail. *See LULAC III*, 986 F.2d at 808-10.

(ii) *Social science problems*

Even without the legal problems inherent in the majority's approach to legally significant white bloc voting and racially polarized voting, the majority's approach is severely flawed from a social science perspective.

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[4] The Department of Justice (DOJ) argues persuasively in its en banc brief that the real issue in *Whitcomb* was not whether blacks in Marion County generally were denied an opportunity to elect their chosen candidates, but whether *ghetto blacks* were being denied such an opportunity. DOJ points specifically to evidence suggesting that "black voters in a middle-class black area were able to elect candidates from their area even when Republicans were winning generally." *See Whitcomb*, 403 U.S. at 133, 150 n.29 (noting that census tract 220, inhabited predominantly by middle class blacks, elected one senator and five representatives). The ghetto area had similar success. During the same time period, it elected one senator and *four* representatives. *Id.* at 150 n.29.

Regardless of whether the majority requires a multivariate regression analysis, which would seek to eliminate all causes of voting behavior other than race, or only a trivariate regression analysis, which would attempt to eliminate partisan affiliation, there is a problem with requiring this type of evidence as an integral part of the vote dilution inquiry: it ignores the critical distinction between experimental research and non-experimental research. Specifically, it ignores the warning of most respected social scientists, including the experts who testified in this case,[5] that the *causes* of voting behavior cannot be determined from the use of any kind of regression analysis--whether bivariate, trivariate, or multivariate.

It is important to recognize that the kind of evidence that the majority requires minority plaintiffs to introduce will involve no experimental manipulation of independent variables. The plaintiffs will not be able to manipulate the race or party affiliation of the candidate to determine which one had the greater effect on election outcomes. Rather, the plaintiffs will have to take existing election results and work backwards. This kind of real world research has been labelled "*non*-experimental research" by social scientists. *See* ELAZAR J. PEDHAZUR, MULTIPLE REGRESSION IN BEHAVIORAL RESEARCH: EXPLANATION AND PREDICTION 175 (2d ed. 1982).

There are two main problems with inferring causation on the basis of regression analyses in the context of non-experimental research:

> First, variables used in nonexperimental research may be, and often are, proxies for causal variables that are not included in the regression equation. . . .

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[5] The State of Texas' expert in this case conceded that his intent in conducting a trivariate regression analysis "was not find out the precise reasons why a candidate won or lost." He further stated that, if he "had tried to get involved in campaign expenditures and incumbency, ratings by the Bar Association, it would be an impossible task to do." *See LULAC III*, 986 F.2d at 805.

> Needless to say, manipulating a proxy variable will not bring about a desired effect regardless of the magnitude of the regression coefficient associated with it. Yet, one encounters frequently not only the interpretation of proxies as if they were causal variables but also recommendations for policy decisions on the basis of such interpretations. . . .
>
> Second, variables in nonexperimental research tend to be intercorrelated. Since more often than not researchers neither understand the causes of the interrelations nor attempt to study them, implications of regression coefficients for policy decisions are questionable.

PEDHAZUR, *supra*, at 224.

Requiring minority plaintiffs to come forward with a multivariate regression analysis to determine the causes of racially divergent voting patterns, as Judge Higginbotham originally advocated in *City of Lubbock*, *see supra* Part I.A.1.a., would implicate the second problem described above. The independent variables listed by Judge Higginbotham--including incumbency, campaign expenditures, party identification, income, media use measured by cost, religion--"tend to be correlated, sometimes substantially." PEDHAZUR, *supra*, at 224. Therefore, "it [becomes] difficult, if not impossible, to untangle the effects of each variable." *Id.* By inferring causation from such analysis, we would undoubtedly be engaging in what amounts to an "almost mindless interpretation[] of regression analysis in nonexperimental research." *Id.* at 223. In short, we would be importing "junk science" into the Voting Rights Act while rejecting it in other contexts.[6]

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[6] Professor Bernard Grofman, of the University of California at Irvine, has recently commented on the pitfalls of drawing conclusions about causation from multivariate analyses of voting patterns. In an article appearing in *Social Science Quarterly*, Professor Grofman laments that "[f]undamental flaws exist in most multivariate

(continued...)

Requiring minority plaintiffs to only come forward with a trivariate regression analysis, as the majority seems to do in this case, does not alleviate the social science problems; it only multiplies them. Not only does such a requirement ignore the fact that the two independent variables (i.e., race and partisan affiliation) are substantially correlated, it also runs the risk that the two variables being studied are only proxies for causal variables that are not included in the regression equation. Indeed, the majority's position in this case directly conflicts with Judge Higginbotham's statement in *City of Lubbock*, where he criticized a bivariate regression analysis for "ignor[ing] the reality that race or national origin may mask a host of other explanatory variables." 730 F.2d at 235. That is, a trivariate

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[6](...continued)
approaches to bloc voting analysis used to date." Bernard Grofman, *Multivariate Methods & the Analysis of Racially Polarized Voting: Pitfalls in the Use of Social Science by the Courts*, 72 SOC. SCI. Q. 826, 828 (1991). Professor Grofman specifically criticizes the methodology used by the defendants' expert in *McCord v. City of Fort Lauderdale*, 787 F.2d 1528, *vacated*, 804 F.2d 611 (11th Cir. 1986). This expert testified that, because the race of the candidate was not significant in explaining election outcomes beyond what could be accounted for by other variables (such as incumbency, campaign expenditures, newspaper endorsements, voter turnout, and the sex of the candidate), race was not really a factor in accounting for voting patterns. *See* 787 F.2d at 829. According to Professor Grofman, the expert's interpretation of the voting statistics was "simply wrong," because, among other things, "there are so many other variables collinear with race used that they almost certainly will reduce [the] significance of race in a multivariate regression." Grofman, *supra*, at 830. Ultimately, Professor Grofman concludes:

> [A]s used so far by expert witnesses for defendants in voting rights cases, multivariate regression methods have produced misleading results about the levels of or existence of racial bloc voting patterns, and have served mainly to misuse statistics and confuse courts.

Id. at 832.

regression analysis such as the one now effectively required by the majority ignores the reality that race or partisanship "may mask a host of other explanatory variables."

The trivariate regression analyses offered in this case undoubtedly demonstrate that the party affiliation of a candidate is a better *predictor* of electoral success than the race of the candidate. Because we are dealing with non-experimental research, however, I cannot take the leap that the majority makes--namely, that the party affiliation of a candidate is the best, or the single most powerful, *explanation* of electoral success. The evidence in this case also demonstrates that, in many of the counties, race is substantially correlated with party affiliation, and the trivariate regression analysis offered in this case did not determine, and could not have determined, why people join certain parties. In my view, then, it can no more explain why people vote the way they do than a bivariate regression analysis. Significantly, for purposes of the Voting Rights Act, it could not negate "race or color" as an explanation for election outcomes.

(iii) *The practical problem*

The majority's approach to legally significant white bloc voting and racially polarized voting places an almost insurmountable hurdle in front of minority groups proceeding under section 2. Unless minority plaintiffs can successfully establish that voters in the controlling political party are racially motivated--either through the use of questionable voting statistics or by calling people from that party and asking them why they voted the way they did[7]--their claim will fail. In fact, they will not even be able to

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[7] *But see Kirksey v. City of Jackson*, 663 F.2d 659, 662 (5th Cir. Unit A Dec. 1981) (holding that, because of First Amendment concerns, voters' motivations are not subject to searching scrutiny by plaintiffs in a voting rights case), *clarified*, 669 F.2d 316 (5th Cir. 1982).

make out a prima facie case.[8]

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[8] In this regard, I note that the majority's position is much more strained and severe than the one taken by Chief Judge Tjoflat of the Eleventh Circuit. In *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990) (evenly-divided en banc opinion), *cert. denied*, 498 U.S. 1023 (1991), Chief Judge Tjoflat, writing for four other judges, advocated a no racial bias affirmative defense under section 2. He reasoned:

> I submit that section 2 prohibits those voting systems that have the effect of allowing a community motivated by racial bias to exclude a minority group from participation in the political process. Therefore, if a section 2 defendant can affirmatively show, under the totality of the circumstances, that the community is not motivated by racial bias in its voting, a case of vote dilution has not been made out.

Id. at 1022 (Tjoflat, C.J., joined by Fay, Edmonson, Cox, and Hill, JJ., specially concurring). The section 2 framework, as he envisions it, would work in a manner analogous to the framework followed in Title VII cases. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If minority plaintiffs satisfy the *Gingles* threshold inquiry, a rebuttable presumption arises that the community is motivated by racial bias. *See Solomon*, 899 F.2d at 1035. If the defendant offers nothing in rebuttal, the minority plaintiffs win. However,

> [i]f. . . the defendant offers proof of other objective factors in rebuttal, the court must be satisfied, before it may rule in favor of the plaintiff[s], that, under the totality of the circumstances, the minority group is denied meaningful access to the political process "on account of race or color." If the defendant can affirmatively show that the "social and historical conditions" are such that their interaction with the scheme will not result in voting discrimination, the plaintiff[s] cannot prevail. *Such an affirmative showing can be made with evidence of objective factors that, under the totality of the*

(continued...)

The typical section 2 vote dilution case--i.e., where a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by minority and white voters to elect their preferred candidates--has two prominent features: One is a politically cohesive minority group (e.g., blacks or Hispanics) whose members share political interests and vote together, usually in a single political party that also includes whites. The other is the existence of a white majority, generally in a different political party, whose voting strength is sufficient usually to defeat the *combined strength* of minority votes plus white "crossover" votes. The problem for minority voters in the typical section 2 case is that they have been submerged in a white majority--unable to forge a coalition with enough whites to elect representatives of their choice. Thus, the Voting Rights Act, as interpreted in *Gingles* and succeeding cases, presupposes partisan voting and asks whether politically cohesive minority voters have an unequal opportunity to participate in the political process--a partisan political process--and to elect representatives of their choice on account of race or color.

Under the majority's reasoning, this typical scenario, the scenario specifically contemplated by the *Gingles*

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[5](...continued)

> *circumstances, indicate that the voting community is not driven by racial bias.*

Id. (internal citations omitted) (emphasis added).

Even Judge Tjoflat recognizes the concept of racial bloc voting does not contain any racial animus requirement. He notes:

> I do not mean to imply that a defendant, by proving absence of racial bias, can rebut a plaintiff's showing of racial bloc voting. . . . Such evidence, however, does not create an irrebuttable case of vote dilution--it is irrebuttable proof of only one factor (albeit an important factor) in the totality-of-the-circumstances test.

Id. at 1035 n.12.

framework, will now preclude a finding of vote dilution. As long as some whites vote with minorities in the Democratic Party, partisan affiliation will *always* be a better predictor of election outcomes than race (even if a few minorities vote Republican). Such circumstances, under the majority's framework, will preclude a finding of vote dilution. In short, the majority has effectively eviscerated section 2 of the Voting Rights Act in communities where there is any measurable crossover voting by whites.[9]

In sum, in the context of a challenge to an at-large election scheme, there are two ways to view a politically cohesive minority group, which, despite the support of some whites, is consistently unable to elect representatives of its choice. I view it as one factor suggesting vote dilution--i.e., that a minority group is submerged in a white majority and unable, despite the support of some whites, to elect representatives of its choice. The majority calls this merely interest group politics.[10] Of course, in calling this interest

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[9] The majority implies that interest group politics did not begin in Texas until the 1980's, when the Republican Party emerged as a force to be reckoned with. The majority ignores that, even when Texas was a one party state, there were still different factions, or interest groups, within the Democratic party. Thus, partisan or interest group politics has always been a feature of Texas' colorful political landscape. To hold otherwise is to ignore the past reality. As noted previously, the evidence in this case reflects that, before 1980, minority-preferred candidates lost in Democratic primary elections, generally to white Democrats; after 1980, minority-preferred candidates *may* make it to the general election, but only to lose to white Republicans. *See LULAC III*, 986 F.2d at 812 n.59. "From the vantage point of minority voters--which is the vantage point of section 2--it is difficult to see how the arrival of a two party system in Texas has altered their ability to participate in the political process and elect candidates of their choice." *Id.*

[10] In support of its assertion that partisan politics, not race, is responsible for the inability of blacks and Hispanics to participate in (continued...)

group politics, the majority treats a racial or language minority group as a mere "interest group" rather than as a politically cohesive minority group striving to make its voice heard.

c. *A more reasonable approach to racial bloc voting, causation, and voters' motivations*

Rather than altering the section 2 framework and requiring minority plaintiffs to negate partisan politics (or perhaps to prove racial animus in the electorate) in order to make out a prima facie case of vote dilution, I would adhere to the framework established by the language of section 2, as interpreted by the Supreme Court and this court. To make out a prima facie case of vote dilution, a minority group would have to satisfy the *Gingles* threshold inquiry by demonstrating: (1) that it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that it is politically cohesive; and (3) that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances--usually to defeat the minority's preferred candidate. *Gingles*, 478 U.S. at 48-51. Once the minority group satisfied the *Gingles* threshold inquiry, it would have to put on evidence of the totality of

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[10](...continued)
the political process and elect representatives of their choice, the majority notes that "white Democrats have in recent years experienced the same electoral defeats as minority voters." Majority Opinion at [54]. It then states:

> If we are to hold that these losses at the polls, without more, give rise to racial vote dilution warranting special relief for minority voters, a principle by which we might justify withholding similar relief from white Democrats is not readily apparent.

Id. The simple answer to this concern about limiting the reach of section 2 is that, unlike the minorities in this case, whites are not politically cohesive. Thus, contrary to the majority's assertions, white Democrats would be no more able to obtain relief under section 2 than would white Republicans.

the circumstances to demonstrate: (1) that it has an unequal opportunity to participate in the political process and elect representatives of its choice, *see* 42 U.S.C. § 1973(b); and (2) that this unequal opportunity to participate and elect is tied to race or color, *see* 42 U.S.C. § 1973(a). *See also LULAC III*, 986 F.2d at 754-55.

To satisfy the third *Gingles* threshold requirement--i.e., legally significant white bloc voting--I would not require minority plaintiffs to either negate partisan politics or prove racial animus in the electorate. Rather, as I explained in my earlier opinion, minority plaintiffs would have to demonstrate "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes." *LULAC III*, 986 F.2d at 745 (quoting *Gingles*, 478 U.S. at 56). This is not necessarily an easy burden. Minority plaintiffs would have to demonstrate, with a fair degree of predictability, the white majority's success. *See Gingles*, 478 U.S. at 51. They could not rely on the loss of an occasional election to establish legally significant white bloc voting. *See id.*

I would similarly look to objective factors in analyzing, under the totality of the circumstances, "the extent to which voting in the elections of the state or political subdivision is racially polarized." S. REP. at 29, 1982 U.S.C.C.A.N. at 206. That is, I reject the argument that "racially polarized voting," as used in the Senate Report, means racially motivated voting or voting caused by racial animus in the electorate. *See LULAC III*, 986 F.2d at 748. For the reasons discussed above, I also reject the majority's more strained, alternative interpretation of this requirement--that racially polarized voting is voting *not caused* by partisan affiliation. Finally, although I would hold that the elections most relevant to the racial bloc voting inquiry are those in which a minority candidate opposes a white candidate, I would not characterize racially polarized voting as "the tendency of citizens to vote for candidates of their own race." *See id.* In my view, racially polarized voting is established when "there is a consistent relationship between

[the] race of the voter and the way in which the voter votes, . . . or to put it differently, where [minority] voters and white voters vote differently." *Gingles*, 478 U.S. at 53 n.21.

This is not to say that the causes of racially divergent voting patterns, or voters' motivations, are irrelevant to the section 2 inquiry. Such causes are relevant to the white bloc voting inquiry under the *Gingles* threshold test, but only to the extent that they call into question the consistency with which the white bloc will oppose minority-preferred candidates. *See LULAC III*, 986 F.2d at 745-46 n.6.[11] The causes of racially divergent voting patterns are also relevant to the totality of circumstances inquiry. If it can be shown that white voters who consistently vote against minority-preferred candidates are motivated by racial animus, such proof could be a signal of vote dilution. *See id.* at 753-54. As Justice O'Connor explained in her *Gingles* concurrence, in "a community that is polarized along racial lines, *racial hostility*" may create even more of a barrier to participation in the political process. *See* 478 U.S. at 100 (emphasis added). It might, for example, affect the "likelihood that

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[11] I therefore agree with Justice O'Connor's position on the extent to which explanations for racially divergent voting patterns are relevant to the white bloc voting inquiry. In *Gingles*, she stated:

> Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for *reasons other than those which made that candidate the preferred choice of the minority group* would seem clearly relevant in answering the question whether bloc voting by white voters will *consistently* defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

478 U.S. at 100 (emphasis added). As noted previously, *see supra* note 3, I read this passage as saying that evidence of partisan voting patterns that overlay racial bloc voting patterns would not call into question the consistent defeat of minority-preferred candidates.

candidates elected without decisive minority support would be willing to take the minority's interests into account." *Id.* For the same reasons, proof that the white voters are not motivated by racial animus would also be relevant to the totality of circumstances inquiry. The absence of proof of racial animus, however, should not weigh heavily against minority plaintiffs proceeding under section 2. "[B]ecause overt political racism has decreased over time, racial animus in the electorate may be difficult, if not impossible to detect." *LULAC III*, 986 F.2d at 754 (citing *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984)).

By refusing to make racial animus in the electorate the focus of the vote dilution inquiry, I am not attempting to sever section 2 from its constitutional underpinnings. Minority plaintiffs ultimately have the burden, under the totality of circumstances inquiry, to demonstrate that their inability to participate in the political process and elect representatives of their choice is "on account of race or color." *See LULAC III*, 986 F.2d at 754-55. This inquiry is not a narrow one that focuses on the present motivation of voters, but a blended one that focuses on the *past and present reality* of the local political landscape. *See* S. REP. at 30, 1982 U.S.C.C.A.N. at 208 Minority plaintiffs can meet this burden by demonstrating some mix of factors under the totality of the circumstances--such as the existence of racially polarized voting, a history of official discrimination, the lingering socioeconomic effects of discrimination, racial campaign appeals, and other features of the current or past racial climate. *See LULAC III*, 986 F.2d at 755.

Unlike the majority, then, I cannot conclude that the district court clearly erred in finding legally significant white bloc voting and racially polarized voting in Texas district court elections--at least with respect to eight of the nine counties at issue in this case. The Plaintiffs offered evidence sufficient to support the district court's findings that the white bloc vote in Bexar, Dallas, Ector, Harris, Jefferson, Lubbock, Midland, and Tarrant counties will usually defeat

the minority's preferred candidate. The Plaintiffs also offered substantial statistical evidence of racially polarized, or racially divergent, voting patterns. The district court's findings with respect to these specific inquiries are plausible in light of the record viewed as a whole; therefore, they are not clearly erroneous.

Nor can I join the majority's conclusion that the district court, by stating that the causes of racially divergent voting patterns are irrelevant to the section 2 inquiry, committed reversible error. The district court was, admittedly, wrong to suggest that the causes of racially polarized voting are irrelevant; however, the evidence offered by the State of Texas in this case concerning the causes of racially divergent voting patterns is insufficient, in my view, to negate or undercut the district court's ultimate finding, in eight of the nine counties, that blacks and Hispanics have an unequal opportunity to participate in the political process and elect representatives of their choice "on account of race or color." *See LULAC III*, 986 F.2d at 803-13. The trivariate regression analyses offered by the State Defendants simply do not explain why people vote the way they do. Even under the majority's narrow view of the section 2 inquiry, they do not negate "race or color" as an explanation for the inability of minorities to elect representatives of their choice.[12] Moreover, as explained in *LULAC III*, uninformed and straight-ticket voting along party lines can, and in this case does, reinforce minority voters' unequal access to the political process. *Id.* at 812.

2. **Other Examples of Alterations in the Section 2 Inquiry**

In its efforts to overhaul section 2, the majority does not stop at reformulating the white bloc voting and racially polarized voting inquiries. It also changes--in some

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[12] This evidence would also, therefore, be insufficient to establish a "no racial bias" affirmative defense, as advocated by Chief Judge Tjoflat of the Eleventh Circuit. *See supra* note 8.

instances, *sua sponte*--the rules with respect to several other specific inquiries under the totality of the circumstances. In particular, the majority (a) now uses the lingering socioeconomic effects of discrimination as a factor arguing against a finding of vote dilution, (b) declares that the history of official discrimination against blacks and Hispanics is to be entitled to little weight, (c) makes certain factors indicative of current racial bias "particularly" important under the totality of circumstances inquiry, and (d) aggregates blacks and Hispanics in two of the counties, even though no one sought to do so in the district court. By further altering the section 2 framework, the majority can confidently conclude that the evidence of vote dilution in this case is "weak."

a. *Lingering socioeconomic effects of discrimination: the paucity of minority lawyers*

The majority concludes that the Plaintiffs' vote dilution case in each of the counties is weakened by the indisputable fact that, in all of the counties, the percentage of minority lawyers is much smaller than the percentage of minority voters. The appalling lack of minority judges on the Texas district court bench does not point towards vote dilution, we are told, because "[t]he absence of eligible candidates goes a long way in explaining the absence of minority judges." Majority Opinion at 76. Indeed, the majority proclaims that minorities are *overrepresented* on the district court bench. It argues, on the one hand, that the Voting Rights Act is "not an unbridled license--to explore for example the persistent low enrollment of black law students." *Id.* at 146. It then suggests, however, that blacks are somehow responsible for their own plight--i.e., for their persistent low enrollment in law school. *See id.* at 146-47.[13]

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[13] I am referring specifically to the majority's decision to explore low black enrollment at Louisiana State University Law School. This "example" has about as much to do with this case as does George

(continued...)

I cannot agree with the majority that the lack or absence of minority lawyers undercuts the Plaintiffs' vote dilution case. First, in assessing the extent to which minority candidates have been elected to public office, the appropriate comparison pool has always been the number of minorities in the population. *See* 42 U.S.C. § 1973(b) ("The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class in numbers equal to their proportion in the population); *see also LULAC III*, 986 F.2d at 750-52.[14] Second, in most of the counties at issue in this case, there are numerous minority lawyers who are well-qualified for the job of Texas district court judge. According to the State of Texas' own exhibits, there are hundreds of eligible minority lawyers in Bexar (317 eligible Hispanics), Dallas (184 eligible blacks), and Harris counties (446 eligible blacks). There are

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[13](...continued)
Wallace's decision to crown a black homecoming queen at halftime of a football game at the University of Alabama. *See LULAC III*, 986 F.2d at 819 (Higginbotham, J., dissenting).

[14] As the Houston Lawyers' Association noted at oral argument, the Voting Rights Act is not about equal employment opportunities; it is about the equal opportunity of *voters* to participate in the political process and elect representatives of their choice. In this regard, it is interesting to note that the majority, in proclaiming that minorities are *overrepresented* on the district court bench, frequently considers minority judges who were not minority-preferred candidates. In Dallas County, for example, the majority recites that five of the thirty-six district judges are black. What the majority does not say is that the two black judges who won partisan elections were not even the preferred candidates of the black community. The majority also ignores the fact that, at the time of trial in Dallas County, no black candidate with the support of the black community had ever won a contested election for district judge. *See LULAC III*, 986 F.2d at 785.

also significant numbers of minority lawyers in several of the other counties. As the district court correctly found, "even if there is some relationship between the low number of minority judges and the number of eligible minority lawyers, that fact does not explain why well qualified eligible minority lawyers lose judicial elections."

Even more inexcusable, however, is the majority's refusal to recognize that the comparative lack of minority lawyers constitutes evidence of the lingering socioeconomic effects of discrimination, which argues in favor of a vote dilution finding. The Senate Report accompanying the amended section 2 instructs courts to consider "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination *in such areas as education, employment*, and health, which hinder their ability to participate effectively in the political process." S. REP. at 29, 1982 U.S.C.C.A.N. at 206. The majority recognizes, as it must, that no one has "questioned [P]laintiffs' assertion that disparities between white and minority residents in several socioeconomic categories are the tragic legacies of the State's discriminatory practices." Majority Opinion at 77. The Plaintiffs introduced exhibits in each of the counties showing that minorities lag unreasonably behind whites in terms of income, education, and employment. Along these lines, it cannot seriously be disputed that the lack of eligible minority lawyers is in no small part the result of past racial discrimination in Texas schools--discrimination that remains unremedied in some cases even to this day.[15]

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[15] For most of its history, Texas has maintained--at all levels--a racially discriminatory education system. *See, e.g., Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that the University of Texas Law School's racially discriminatory admittance policy violated the Equal Protection clause of the Fourteenth Amendment). This system of dual schools, which were undoubtedly separate and unequal, began to be remedied as early as 1960 in the Houston public school system. *See Houston Indep. Sch. Dist. v. Ross*, 282 F.2d 95 (5th Cir. 1960) (continued...)

[15](...continued)
(affirming district court order which required desegregation of schools to begin in September 1960); *see also Flax v. Potts*, 464 F.2d 865, 867 (5th Cir.) (noting that Fort Worth Independent School District had official policy of segregation until 1967), *cert. denied*, 409 U.S. 1007 (1972). Other communities, however, began dismantling their dual school systems at a much later date. *See United States v. CRUCIAL*, 722 F.2d 1182 (1983) (affirming district court's finding that Ector County engaged in intentional segregation of black and Hispanic students, which extended into the 1981-82 school year); *Graves v. Barnes*, 378 F. Supp. 640, 648 (W.D. Tex. 1974) (three-judge court) (finding that twenty years after the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Beaumont Independent School District continued to bus black children away from their neighborhood schools and across town to all-black schools), *vacated sub. nom. White v. Regester*, 422 U.S. 935 (1975); *id.* at 654-55 (recognizing that authorities in Lubbock County maintained racially and ethnically segregated schools until the 1970's). As a result of these desegregation efforts, many of the school districts that were under court supervision for some twenty years finally achieved unitary systems during the 1980's. *See, e.g., United States v. Texas Educ. Agency*, 138 F.R.D. 503, 505 (N.D. Tex. 1991) (noting that Lubbock Independent School District was declared to be a unitary system in May 1988), *aff'd*, 952 F.2d 399 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2992 (1992); *Flax v. Potts*, 725 F. Supp. 322, 330 (N.D. Tex. 1989) (declaring Fort Worth Independent School District to be unitary), *aff'd*, 915 F.2d 155 (5th Cir. 1990); *Covington v. Beaumont Indep. Sch. Dist.*, 714 F. Supp. 1402, 1404 (E.D. Tex. 1989) (noting that Beaumont Independent School District was declared unitary in 1984). The only notable exception in this regard is the Dallas public school system, which continues to be under court supervision. *See Tasby v. Edwards*, 807 F. Supp. 421 (N.D. Tex. 1992)

The point of this discussion is that many minorities residing in the target counties at issue in this case--especially those who are forty or older--attended segregated schools. This is precisely the age group from which one would expect state district court judges to be drawn. How one can say that this past discrimination does not hinder the current ability of blacks and Hispanics to participate in the political process involving the election of state district court judges escapes me.

Nor can one seriously dispute that this lingering socioeconomic effect of discrimination hinders the ability of minorities to participate in the political process. Contrary to the majority's suggestions otherwise,[16] "[t]he requirement that the political processes leading to nomination and election be 'equally open' to participation by the group in question extends beyond formal or official bars to registering and voting, or [even] to *maintaining a candidacy*." *Id.* at 30, 1982 U.S.C.C.A.N. at 208 (emphasis added); *see also Shaw v. Reno*, 113 S. Ct. 2816 (1993) (noting that the success of the Voting Rights Act of 1965 in reducing the spread between black and white voter registration did not suffice to root out other racially discriminatory voting practices, such as multi-member or at-large electoral systems); *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) ("There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth."). That is, the question of whether the lingering socioeconomic effects of discrimination hinder the ability of minorities to participate in the political process is much broader than asking whether they register and vote at rates equal to whites. *See* S. REP. at 6, 1982 U.S.C.C.A.N. at 183 (noting that "registration is only the first hurdle to full effective participation in the political process"); *id.* at 30 n.120, 1982 U.S.C.C.A.N. at 208 n.120 ("[T]he conclusion .

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[16] The majority holds that Plaintiffs can only show depressed political participation by pointing to low voter registration or low voter turnout rates. Based on this holding, it reverses as clearly erroneous the district court's finding that blacks and Hispanics throughout the State of Texas continue to bear the effects of past discrimination, which hinder their ability to participate in the political process. Thus, while the majority uses the lack of minority lawyers against the Plaintiffs with respect to the inquiry into the number of minority judges, it ignores the lack of minority lawyers on the question of whether the lingering socioeconomic effects of discrimination hinder the ability of blacks and Hispanics to participate in the political process. This is absurd.

. . . that in fact [minorities] ha[ve] registered and voted without hindrance" is not dispositive under section 2). One aspect of the ability to participate in the political process must surely include the ability to run for the office, and as long as minorities continue to bear the effects of past discrimination in education and employment, their ability to participate in the Texas district court political process will be severely hindered. *See* TEX. CONST. art. V, § 7 (establishing eligibility requirements for district court judges).

Thus, like the majority, I would hold that the relative lack of eligible minority candidates is relevant to the section 2 inquiry. Unlike the majority, however, this indisputable fact would not argue *against* a finding of dilution; it would be compelling evidence of the extent to which blacks and Hispanics continue to "bear the effects of discrimination in such areas as education [and] employment, . . . which hinder their ability to participate effectively in the political process." S. REP. at 29, 1982 U.S.C.C.A.N. at 206.[17]

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[17] There is also testimony in the record suggesting that the ability of minorities to run in county-wide elections is hampered by their lack of financial resources. The majority, after weighing this evidence with other evidence suggesting that minorities were able to raise funds, finds that minorities were able to run well-financed campaigns. It thus concludes that the testimony from several witnesses about minority candidates' lack of financial resources does not support the district court's finding that the lingering socioeconomic effects of discrimination hinder the ability of minorities to participate effectively in district court elections. I disagree. In my view, the testimony of these witnesses, as well as Dr. Brischetto's expert testimony on the subject, provide further support for the district court's finding in this regard.

Moreover, as I noted in my earlier opinion, the issue of whether blacks and Hispanics continue to suffer the effects of discrimination--effects that hinder their ability to participate in the political process--was not a contested issue at trial and has not been pursued by the parties on appeal. *See LULAC III*, 986 F.2d at 782-83 n.41. The majority's decision to pursue this issue and reverse the

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b. *Past official discrimination*

The majority also suggests that the long history of discrimination against blacks and Hispanics in Texas is entitled to little, if any, independent weight under the totality of the circumstances. The majority recognizes that "Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute." Majority Opinion at 77. However, in discussing the totality of the circumstances in its application of the law to each county, the majority brushes over this history as if it were somehow irrelevant to the section 2 inquiry. I cannot join this decision to amend section 2.

The Senate Report specifically instructs courts to consider, as an independent factor under the totality of the circumstances, "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the political process." S. REP. at 28, 1982 U.S.C.C.A.N. at 206. By including this factor as a signal of vote dilution, Congress made a legislative decision, which we must respect, that evidence of past discrimination--even standing alone--is a factor pointing toward vote dilution under section 2. Indeed, in amending section 2 and enacting the results test, Congress intended to remedy past discrimination. It expressly found "that voting practices and procedures that have discriminatory results *perpetuate the effects of past purposeful discrimination*." *Id.* at 40, 1982 U.S.C.C.A.N. at 218 (emphasis added). The majority effectively ignores this legislative decision by requiring Plaintiffs to demonstrate that the effects of past discrimination "actually hamper the ability of minorities to participate." Majority Opinion at 77.

The majority thus attempts, in the words of Charles

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[17](...continued)
district court's finding on clearly erroneous grounds is, thus, a further indication of its insistence on cleaning up--or cleaning out--section 2.

Black, Jr., to "uncouple present from past." Charles L. Black, Jr., *And Our Posterity*, 102 YALE L. J. 1527, 1529 (1993). As Professor Black aptly observes, however,

> This disconnection of present from past . . . cannot be made to seem successful today, any more than in 1883. American slavery lasted more than two centuries, not too far from twice the time since its abolition. Even abolition was not the end. Quite soon after the Civil War, the national effort to remedy the situation of the newly free was as good as abandoned; in the places where most of them lived they were not even so much as allowed to vote in the only election that counted; *per capita* public expenditures in public schools for their children ran far below--sometimes by a factor of one to ten--expenditure in white schools. The paradox of "separate but equal," improvised--like the white primary--with a broad knowing wink, not only imprisoned black people in these schools, but also cut off all black people, children and grown-ups, from any kind of equal participation in the common life of the community.

Id. at 1529-30; *see also supra* note 15.

The simple fact is that blacks and Hispanics in Texas have indisputably been the victims of official discrimination in all areas of life. The district court was warranted in taking judicial notice of this history, and in giving it weight in deciding whether the Plaintiffs demonstrated an inability to participate in the political process and elect representatives of their choice "on account of race or color." For the majority to suggest otherwise is to "publish a general Act of Oblivion." Black, *supra*, at 1530. I will not join such an act.

c. *The elevation of several factors under the totality of circumstances inquiry*

The majority further reveals its intent to shift the focus of the section 2 inquiry by elevating certain factors under the totality of the circumstances. In particular, the

majority states that, in determining the strength of a vote dilution case, courts must consider, among other things: the willingness of the racial or ethnic majority to give their votes to minority candidates of their own party; whether the minority plaintiffs have found proof of racial campaign appeals; and whether elected officials were found to be non-responsive to the needs of minority voters.

These factors are undoubtedly relevant to the section 2 inquiry, but to elevate them, as the majority does, changes the focus of the analytical framework. All of them--the willingness of white voters to vote for minority candidates of their own race,[18] the existence of racial campaign appeals,

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[18] In reversing the district court's findings of vote dilution, the majority places heavy emphasis on the fact that, in several of the counties, white majorities voted for Republican minority judicial candidates. It also creates the impression that the Republican Party aggressively recruited minority candidates in all of the counties at issue. Majority Opinion at 63. This picture is not entirely accurate.

While there was evidence in Dallas County that two black Republican district court candidates were elected with the support of the white majority, there was also expert testimony, based on a telephone survey, that most voters in Dallas County had absolutely no idea of the race of the candidate for whom they were voting. At most, then, this evidence shows that white voters in Dallas County could not have been motivated by specific racial animus toward candidates. But this is only because of the so-called anonymity factor. There was also, admittedly, evidence suggesting that the Republican Party in Dallas County attempted to recruit minority candidates.

As for the other counties, however, there is little, if any evidence that white majorities would support Republican minority candidates in district court elections. This is because, as best I can tell from the record: (1) in Harris County, only one black Republican district court candidate won a contested district court election; (2) in Bexar County, only one Hispanic Republican won a contested district court election; and (3) in Tarrant County, only one black Republican won a contested district court election. This lack of Republican minority district court candidates also calls into question the

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and the responsiveness of elected officials--are concerned primarily with current racial animus in either the electorate, in candidates, or in elected officials. In my view, current racial hostility is not the ultimate focus of section 2. *See supra* Part I.A.1.c.

Moreover, elevating these factors ignores Congress' instructions in the Senate Report that "there is no requirement that any particular number of factors be proved, or that a majority point one way or the other." S. REP. at 29, 1982 U.S.C.C.A.N. at 207. In particular, it ignores the statement in the Senate Report that "[u]nresponsiveness is not an essential part of plaintiff's case."). *Id.* at 29 n.116; 1982 U.S.C.C.A.N. at 207; *see also United States v. Marengo County Comm'n*, 731 F.2d at 1571 (The absence of racial campaign appeals "should not weigh heavily against a plaintiff proceeding under the results test of section 2."). Unlike the majority, then, I would not elevate these factors under the section 2 inquiry.

d. *Forcing minority groups to proceed as a coalition*

Finally, the majority demonstrates the extent to which it will go to overhaul section 2 (and to preserve Texas' method for electing district court judges) by holding that the district court clearly erred in refusing to give equal weight to elections involving whites and Hispanics in Harris and Tarrant counties. In both of these counties, Plaintiffs proceeded only on behalf of black voters. The majority, noting that political cohesion is a "question of fact" and not a strategic card, makes a finding of fact on appeal that blacks and Hispanics in these two counties are politically cohesive. It makes this fact finding even though the parties

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[15](...continued)
majority's assertion that the Republican Party actively recruited minority candidates in other counties. There is very little evidence of any such recruitment in counties other than Dallas.

never requested the district court to do so.[19]

By making this finding, the majority shows a complete lack of judicial restraint. Regardless of what one thinks about allowing various minority groups to voluntarily

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[19] Indeed, as I noted in my earlier opinion in this case, with respect to Harris County, the parties specifically argued in the district court (and requested a fact finding) that "Blacks and Hispanics together in Harris County do not constitute a politically cohesive minority group." *See LULAC III*, 986 F.2d at 789. And in Tarrant County, no party ever requested a fact finding that blacks and Hispanics are politically cohesive. *See id.* at 799-800 n.49.

The majority asserts that the parties' failure to request a finding on the question of whether blacks and Hispanics in Harris and Tarrant counties is beside the point. It argues that the claim raised on appeal is that the district court improperly refused to consider elections involving Hispanic candidates, elections studied by the State of Texas' own expert. This latter question, the majority asserts, "is most assuredly before" this court. I disagree.

The State of Texas, *in a reply brief* to the original panel that heard this case in 1990, raised this issue for the first time on appeal. It asserted:

> If [a coalition of blacks and Hispanics] can be proved by voting rights plaintiffs in order to help them meet the first two *Gingles* preconditions, what prevents voting rights defendants from proving the existence of such a de facto coalition in order to shed light on whether the third *Gingles* precondition can be met? The district court denied the State Officials that opportunity in the targeted counties, including Harris and Tarrant Counties, by treating as irrelevant the numerous races analyzed there involving Anglo judicial candidates versus Hispanic judicial candidates . . . .

Thus, the defendants "raised" this issue by asking a rhetorical question in a reply brief. Even if there were nothing to prevent voting rights defendants from *proving* the existence of a *de facto* coalition between blacks and Hispanics in Harris and Tarrant counties, the problem with the argument is that the State of Texas simply did not seek to prove this *fact* in front of the district court and, with regard to Harris County, expressly requested a fact finding to the contrary.

combine themselves for section 2 purposes,[20] it is clear that, if such coalition minority groups are permitted, "proof of minority political cohesion is all the more essential." *Growe v. Emison*, 113 S. Ct. at 1085. In my view, it is not within the power of a federal appellate court to make this fact finding--especially where none was requested below.

3. **The Result of the Majority's Handiwork**

In sum, I reject the majority's characterization of the evidence of vote dilution offered in this case. It can only be characterized as weak by altering the section 2 inquiry, which the majority does freely. No longer is the inquiry a blended one, which looks to the past and present reality of the local political landscape. It is now a selective inquiry into the present. I cannot join this restructuring of the section 2 inquiry.

B. *The Weight of the State of Texas' Interest in Maintaining the Current Electoral System*

Nor can I join the majority in its conclusion that the State of Texas' interest in maintaining its current system--specifically, its interest in linking electoral base to "primary jurisdiction"--is substantial enough to outweigh the Plaintiffs' proof of vote dilution. This interest is little more than tenuous and could not outweigh even weak evidence of vote dilution.

The majority argues that Texas links the primary jurisdiction of its district courts with their electoral base in order to preserve the values of independence and

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[20] The majority curiously does not feel the need to revisit our decision in *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1988)--despite the fact that several of my colleagues obviously disagree with the principle of allowing minorities to proceed as a coalition under section 2. *See Campos v. City of Baytown*, 849 F.2d 943 (5th Cir. 1988) (Higginbotham, J., joined by Gee, Garwood, Jolly, Davis, and Jones, JJ., dissenting from denial of rehearing en banc); *League of United Latin American Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1503 (5th Cir. 1987) (Higginbotham, J., dissenting).

accountability. This so-called linkage interest, we are told, is substantial, because it represents the State of Texas' decision about what constitutes a state district judge. According to the majority, by linking district judges' electoral base with their area of primary jurisdiction, the State of Texas has made a decision similar to the State of Missouri's decision in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), to have age qualifications for its judges.

Assuming *arguendo* that we are supposed to weigh non-tenuous state interests against proven vote dilution,[21] there are several flaws in the majority's analysis of the strength of Texas' linkage interest. First, I remain unconvinced that Texas insists on linking "primary jurisdiction" with electoral base. Also, there is a serious question as to whether this linking of primary jurisdiction with electoral base actually promotes the values of independence and accountability. Finally, Texas' linkage interest can be equally served by other means, means that would not dilute minority voting strength. Once these analytical flaws are exposed, it becomes clear that Texas' decision to link electoral base with primary jurisdiction is not at all comparable to Missouri's decision in *Gregory* to have age limits for its trial judges.

1. **Questioning Texas' Insistence on Linkage**

The majority concludes that the State of Texas does in fact link the primary jurisdiction of state district court

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[21] Before the Supreme Court's decision in *Houston Lawyers' Association v. Attorney General of Texas*, 111 S. Ct. 2376 (1991), courts considered, in the liability phase of a section 2 case, only whether the state's interest in the current electoral scheme was tenuous. Although I have some questions as to whether the Court, in *Houston Lawyers' Association*, meant to change the inquiry and require proven vote dilution to be balanced against non-tenuous state interests, *see LULAC III*, 986 F.2d at 757-64, I recognize that the Court's opinion in that case can be read to require such balancing. *See also* Robert B. McDuff, *Judicial Elections and the Voting Rights Act*, 38 LOY. L. REV. 931, 958-60 (1993).

judges with their electoral base. In doing so, it ignores that the concept of "primary jurisdiction" is found *nowhere* in Texas law. It also ignores that any historical insistence on "linkage" has been seriously undermined in recent years--and in recent weeks.

As discussed in my earlier opinion, state district judges in Texas do not have "primary jurisdiction" that is co-extensive with a county. *See LULAC III*, 986 F.2d at 767; *see also* McDuff, *supra* note 21, at 956-57. They may have primary venue responsibility that coincides with county lines, but a state district judge has *state-wide* jurisdiction. *See* TEX. CONST. art. V, § 8. For example, a state district judge elected only by the voters of Travis County has the power to declare unconstitutional the entire state's method of financing public schools. *See Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (affirming trial court's decision). Thus, it is misleading for the majority to insist that Texas links the "primary jurisdiction" of district court judges with their electoral base. Indeed, the very opposite is the case: a Texas district judge's jurisdiction extends far beyond his or her electoral base. The majority is saying no more than that Texas' electoral districts, which are no smaller than a county, usually coincide with the venue unit under Texas law, which is also the county.

Moreover, Texas does not insist that its district judges be elected from an area no smaller than a county. Since 1985, the Texas Constitution has specifically authorized the voters of a county to decide to elect their district judges from an area smaller than a county. *See* TEX. CONST. art. V, §§ 7, 7a. Texas also makes extensive use of visiting and retired judges, thus indicating its willingness to use judges who either were not elected at all or whose electoral base is not at all linked to some amorphous concept of "primary jurisdiction." *See LULAC III*, 986 F.2d at 768. Also relevant in this regard is the State of Texas' willingness to settle this lawsuit, which is discussed more fully in Part II *infra*. The Governor, the Attorney General, and the elected representatives of the people of the state have all expressed

approval of a settlement calling for the election of district judges from areas that are smaller than a county. These recent events undoubtedly call into question the State of Texas' insistence on linkage.

2. **Questioning the Value of Linkage**

Even if the State of Texas did consistently link a district judge's electoral base with venue, there is a serious question as to whether such insistence on linkage would in fact advance Texas' interests in judicial accountability and independence. The reality is that Texas's venue rules do not, and were not meant to, ensure the accountability of judges. Moreover, there are flaws in the assumptions underlying majority's assertion that linkage serves to advance the independence and fairness of district judges.

I do not see, and the majority does not explain, how linking electoral base with venue advances the State of Texas' interest in judicial accountability. If linkage did advance such an interest, one might expect the state's venue rules to reflect this purpose. As previously noted, however,

> The Texas venue rules have not been drafted to insure that parties appear before judges for whom they have had an opportunity to vote. Instead, the venue rules for lawsuits involving living persons. . . "were, in the main, manifestly adopted to prevent serious inconveniences and probable injury to defendants. . . . *Snyder v. Pitts*, 150 Tex. 407, 241 S.W.2d 136, 142 (1951).

LULAC III, 986 F.2d at 768. Moreover, given the unusually large size of the election districts in several of the counties at issue in this case, it strains credibility to maintain that linkage advances the state's interest in judicial accountability. As several of the defense witnesses at trial testified, most people have no idea of who they are voting for in district court elections. These observations suggest that linkage in the large counties at issue in this case, rather than advancing the value of judicial accountability, actually detracts from it. *See also* H.J. of TEX, 73d Leg., R.S. 479, 482 (1993) (Address of Chief Justice Thomas R. Phillips) (arguing that

retention elections should be used to enhance the accountability of judges and suggesting that, under the current system, "the people have no meaningful vote").

As for the State of Texas' interest in judicial independence, linkage advances it, if at all, only marginally. What ensures judicial independence are the integrity of individual judges and the Texas Code of Judicial Conduct, which directs judges not to be swayed "by partisan interests, public clamor, or fear of criticism." TEX. CODE OF JUDICIAL CONDUCT, Canon 3, pt. A(1). The argument that linkage advances the State of Texas' interest in judicial independence is, at bottom, a smokescreen: It suggests that district judges who are currently elected by white majorities, often with the substantial support of plaintiffs' lawyers, defense lawyers, or some other interest group, are responsive to the needs of all voters in the county--including minority voters. Yet it assumes that a judge elected from a majority-minority district would somehow be less willing to follow his or her oath or to be responsive to the needs of all. There is absolutely no evidence in the record to support such an assumption. *See also* McDuff, *supra* note 21, at 949 ("Of course, absolutely no reason exists to believe that black judges elected from majority black districts or Hispanic judges elected from majority Hispanic districts will be any more 'partisan advocates' than the white judges presently elected from majority white districts.").

3. **The Existence of Less Intrusive Means**

Finally, Texas' linkage interest is weakened by the existence of less intrusive means. I am referring specifically to the possible use of limited or cumulative voting. Both of these methods of election would preserve the link, to the extent there is any, between a district judge's electoral base and his or her area of primary venue responsibility. It would also serve, at least to the same extent as the current method of electing judges, Texas' interests in having accountable and independent judges.

The majority's refuses to consider cumulative and limited voting as a less intrusive means. It argues that,

because "[l]imited and cumulative voting are election mechanisms that preserve at-large elections," they "are not 'remedies' for the particular structural problem that the plaintiffs have chosen to attack." Majority Opinion at 103. Thus, the majority decides, "[w]e will not discount [the state's] interest based upon purported remedies that preserve the challenged at-large scheme." *Id.*

The majority misses the point. The Plaintiffs in this case allege that Texas' current method of electing district judges in county-wide elections dilutes their voting strength. Contrary to the majority's hypertechnical argument, cumulative or limited voting would remove the *dilutive* aspect of the current at-large system, which is what the Plaintiffs are challenging. That it would also preserve county-wide elections merely serves to demonstrate that it is a *less intrusive means* for advancing Texas' asserted interests. The majority's refusal to consider these other means, in determining the weight of the state's interests, is indefensible.[22]

4. **The Nature of Texas' Linkage Interest**

Contrary to the majority's assertions, Texas' interest in linking the electoral base of its judges with venue is not a decision about what constitutes a state district court judge; indeed, it is nothing more than a decision about how to elect district court judges. The state's insistence on linking the electoral base of district judges with their area of primary venue responsibility has, in recent years and recent weeks,

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[22] Even Chief Justice Phillips has publicly recognized that a system using limited and cumulative voting could remedy the dilutive aspect of Texas' current at-large election system. In his recent State of the Judiciary Address, he noted that "[m]inority voters could be protected by any method which permits votes to be aggregated or limits each voter to fewer votes than the number of positions to be filled." H.J. OF TEX., 73d Leg., R.S. 479, 483 (1993). He further stated that, "[w]hile little used in judicial elections, such procedures have long been used in both public and private elections around the world." *Id.*

almost evaporated, and there are serious doubts as to whether linkage in fact advances the values of judicial accountability and independence. Further, there are other means to preserve the so-called linkage interest. Unlike the majority, then, I cannot say that the State of Texas' interest in linkage--which is simply a short-hand way of referring to its interest in maintaining the status quo--is anything like Missouri's decision in *Gregory* about the qualifications of a state judge.

I would therefore hold that the state's interest in linking the electoral base of its judges with their primary venue responsibility, allegedly to foster judicial independence and accountability, is little more than tenuous. At best, the argument is about appearances. At worst, it exhibits an unfounded fear of having judges elected from majority-minority districts. In any event, the majority's conclusion that this interest is substantial is not founded in the record, in Texas law, or in reality. It could not outweigh the evidence of vote dilution in this case even if that evidence were only weak, which it manifestly is not.

II. *THE MOTION TO REMAND*

Given the majority's misguided and destructive efforts on the merits of this case, one might reasonably ask why the Plaintiffs and the State of Texas, acting through its Attorney General, were not given the opportunity to settle this dispute. The majority offers three reasons: First, the majority suggests that the motion to remand should be denied because the Texas Attorney General is somehow acting beyond the scope of his authority. The majority also makes a related argument that the motion must be denied because not all of the "defendants" have consented to the remand or to the proposed settlement. Finally, the majority declines to remand for a hearing on the proposed settlement on the ground that the settlement is inconsistent with state law.

As explained below, none of the reasons proffered by the majority precludes a remand for purposes of conducting

a settlement hearing. That is, the majority could have easily remanded this case, but chose not to because it wanted to reach the merits of this case and overhaul the Voting Rights Act. I cannot embrace such reasoning.

A. *Does the Attorney General Have the Authority to Settle this Lawsuit?*

In suggesting that the Texas Attorney General is acting beyond the scope of his authority by agreeing to the proposed settlement and requesting a remand, the majority misperceives the nature of the Attorney General's status in this lawsuit. That is, the majority treats the Attorney General as just another lawyer who is representing the various officials named as defendants. The Attorney General, however, is not just another lawyer; he is also a named defendant, as well as the chief legal officer for the State of Texas in this litigation. As such, he had the power under Texas law to negotiate and execute the proposed settlement and to request a remand of this case.

1. **The Nature of this Lawsuit**

The majority correctly notes that the Plaintiffs in this case filed suit against the Attorney General of Texas, the Texas Secretary of State, and the members of the Texas Judicial Districts Board (including the Board's chairman, Chief Justice Phillips). These defendants were not named in their individual capacities, but only in their official capacities. The Plaintiffs were apparently required to do this under the Supreme Court's Eleventh Amendment jurisprudence--specifically, under the fiction of *Ex Parte Young*, 209 U.S. 123 (1908), which holds that a suit for declaratory and injunctive relief against state officers does not constitute a suit against the state for Eleventh Amendment immunity purposes.[23]

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[23] The general rule is that, for purposes of determining whether a suit in federal court is barred by the Eleventh Amendment, an official-capacity lawsuit is a suit against the state itself rather than a

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suit against the named official. In *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985), the Court explained:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. See, *e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon* [*v. Holt*, 469 U.S. 464, 471-72 (1985)]. It is *not* a suit against the official personally, for the real party in interest is the entity.

(emphasis in original). Official-capacity lawsuits, because they are in essence lawsuits against the state, are generally barred by the Eleventh Amendment. *See Kentucky v. Graham*, 473 U.S. at 167 n.14 ("Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, . . . a State cannot be sued directly in its own name regardless of the relief sought.") (citing *Alabama v. Pugh*, 438 U.S. 781 (1978)).

There is an exception to this rule. Specifically, "[i]n an injunctive or declaratory action grounded on federal law, the State's immunity *can* be overcome by naming state officials as defendants." *Kentucky v. Graham*, 473 U.S. at 169 n.18. As the Supreme Court itself has recognized, this exception is based purely upon a legal fiction. *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 26 (1989) (recognizing that *Ex Parte Young* established a "fiction"); *Cory v. White*, 457 U.S. 85, 95 (1982) (referring to "fiction of *Ex Parte Young*"); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (same). Under this fiction, because state officers have no authority to violate federal law, their illegal acts, although qualifying as "state action," are not "acts of the state"; therefore suits to enjoin those acts or to declare them illegal are not precluded by the Eleventh Amendment. *See Young*, 209 U.S. at 159-60. Thus, under

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Jurisdictional fictions notwithstanding, I would hold that, at least for purposes of determining whether this case should be remanded, this is a suit against the State of Texas itself. Indeed, in one of our previous opinions, we recognized that the Plaintiffs sued "Texas through its officials." *League of United Latin American Citizens, Council No. 4434 v. Clements*, 923 F.2d 365, 367 (5th Cir. 1991) (Gee, J.) (en banc); *see also id.* (again recognizing that the "defendant" in this case is "the state"). Given the fact that section 2 only prohibits a "State or political subdivision" from employing certain voting practices and procedures, *see* 42 U.S.C. § 1973(a), our recognition that this lawsuit was in all aspects (other than for Eleventh Amendment purposes) filed against the State of Texas was entirely warranted. *See also League of United Latin American Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989) ("A voting rights case *challenges the election process* rather than the individuals holding offices.") (emphasis added).

This case is not, therefore, like *Public Utility Comm'n of Texas v. Cofer*, 754 S.W.2d 121 (Tex. 1988), where the Attorney General's clients--two state agencies which he was obligated to represent under separate statutes[24]--were on

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[23](...continued)
the *Young* fiction, "official capacity actions for prospective relief are not treated as actions against the State" for purposes of the Eleventh Amendment. *Kentucky v. Graham*, 473 U.S. at 167 n.14. *But see also Diamond v. Charles*, 476 U.S. 54, 57 n.2 (1986) (noting, in context of suit against state officials for declaratory and injunctive relief, that "[a] suit against a state officer in his official capacity is, of course, a suit against the State").

[24] *See* TEX. REV. CIV. STAT. ANN. art. 601b, § 10.11 (Vernon Supp. 1987) (providing that the attorney general "shall represent the [State Purchasing and General Services Commission] before the courts in all appeals from rate cases in which the commission intervenes"); TEX. REV. CIV STAT. ANN. art. 1446c, § 15 (Vernon Supp. 1987) (providing that the attorney general shall represent the (continued...)

opposing sides of litigation in state court. Thus, it is not a case where we must be concerned with possible conflicts of interest. *See id.* at 125. Rather, this is a case in which certain officials were named as "jurisdictional parties." *See Bullock v. Texas Skating Ass'n*, 583 S.W.2d 888, 894 (Tex. Civ. App.--Austin 1979, writ ref'd n.r.e.). In short, I think that the Attorney General's client in this case is the State of Texas--not the various officials who were joined solely for Eleventh Amendment purposes.

2. **The Attorney General's Power to Represent the State**

Once it is recognized that the State of Texas and its election process are the real targets of the Plaintiffs' lawsuit, the question then becomes: Who is authorized to represent state and protect its interests? The answer is supplied by state law. *Cf. New York v. Uplinger*, 467 U.S. 246, 248 (1984) ("The allocation of authority among state officers to represent the State before this Court is, of course, wholly a matter of state concern.).

The State of Texas, through constitutional and statutory law, has appointed the Attorney General to represent its interests in litigation such as this.[25] The Texas Constitution specifically provides that the Attorney General "shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party." TEX. CONST. art IV, § 22. The interpretative commentary to this provision notes that the "attorney general is the chief law officer of the state" and has the

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[24](...continued)
Public Utilities Commission "in all matters before the state courts, and in any court of the United States, and before any federal public utility regulatory commission").

[25] As explained more fully below, district attorneys and county attorneys also have the authority to represent the state in some circumstances. *See* TEX. CONST. art. V, § 21; *see also Baker v. Wade*, 769 F.2d 289, 291 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

responsibility of "*representing the state* in civil litigation." *Id.*, interp. commentary (emphasis added). The Texas Government Code is similarly explicit in naming the Attorney General to speak for the state. It provides: "The attorney general shall prosecute and defend all actions in which the state is interested before the supreme court and courts of appeals." TEX. GOV'T CODE ANN. § 402.021 (Vernon 1990).

Contrary to the majority's assertions, the Texas Attorney General is not just another lawyer. Unlike an ordinary lawyer he is entitled and obligated by law to represent his client, the state. The Texas Supreme Court recognized as much in *Maude v. Terrell*, 109 Tex. 97, 200 S.W. 375, 376 (1918), when it explained:

> [T]he powers thus conferred by the Constitution upon [the Attorney General and the county and district attorneys] are exclusive. The Legislature cannot devolve them upon others. Nor can it interfere with the right to exercise them. It may provide assistance for the proper discharge by these officials of their duties, but since in the matter of prosecuting the pleas of the State in the courts the powers reposed in them are exclusive in their nature, it cannot, for the performance of that function, obtrude other persons upon them and compel the acceptance of their services. Wherever provision is made for the services of other persons for that express purpose, it is the constitutional right of the Attorney-General and the county and district attorneys to decline them or not at their discretion, and, if availed of, the services are to be rendered in subordination to their authority.

(internal citations omitted); *see also Hill v. Texas Water Quality Board*, 568 S.W.2d 738, 741 (Tex. Civ. App.--Austin 1978, writ ref'd n.r.e.) ("[E]ither the Attorney General or a county or district attorney may represent the State in a particular situation, but these are the only choices[;] whichever official represents the State exercises exclusive

authority and if services of other lawyers are utilized they must be 'in subordination' to his authority."). Moreover, the Texas Attorney General has broad discretion to control litigation strategy where he is representing the state. Indeed, in *Charles Scribner's Sons v. Marrs*, 114 Tex. 11, 262 S.W. 722, 727 (1924), the Texas Supreme Court stated that, "[e]ven in the matter of bringing suits, the Attorney General must exercise judgment and discretion, which will not be controlled by other authorities." *See also Bullock v. Texas Skating Ass'n*, 583 S.W.2d at 894.

Despite this language from the highest court in Texas, the majority insists that the Attorney General is not the exclusive representative of the State of Texas in matters of litigation. The majority curiously finds compelling Chief Justice Phillips' argument that, as Chairman of the Judicial Districts Board, "he has the authority to defend this lawsuit if the Attorney General will not." Majority Opinion at 12.[26]

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[26] I say "curiously" because Chief Justice Phillips has never sought to represent the interests of the state in this appeal. At oral argument, when he was specifically asked whether he was seeking to represent the state on appeal from the liability decision, Chief Justice Phillips said that he was not. That is, he made it clear that his complaints go only to the specifics of the proposed settlement--not to the idea of settling this case in general. Indeed, in a speech to the Texas legislature, Chief Justice Phillips conceded that, regardless of the outcome in this litigation, the current system of electing district judges is indefensible. He explained:

> Let there be no mistake: the current at-large system is no longer acceptable. In Dallas County, 37% of the people, but less than 14% of the judges, are African-American or Hispanic. In Harris County, 42% of the people, but less than 9% of the judges, are from the same minority populations. Candidates from these racial and ethnic groups have often been defeated in campaigns for benches in those counties. The federal courts may ultimately hold that the evidence presented in pending litigation is

(continued...)

In support of this finding, the majority relies heavily on our en banc decision in *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986), where we permitted a state district attorney to represent the State of Texas' interests on appeal after the Attorney General declined to do so.

The majority's reliance on *Baker* is wholly misplaced. In allowing a state district attorney to intervene on appeal and defend the constitutionality of Texas' sodomy statute, Judge Reavley emphasized the narrowness of the decision. Among other things, he noted that, "as of the date of the entry of the district court's judgment, [the state district attorney] was a member of the [defendant] class, was enjoined by that judgment, and *as district attorney was a proper official under Texas law to represent the state.*" *Id.* at 291 (emphasis added) (citing TEX. CONST. art. V, § 21). In this case, by contrast, Chief Justice Phillips is not a proper official under Texas law to represent the state. Indeed, the majority has pointed to no provision of Texas law, and I can find none, that would even arguably allow the members of the Texas Judicial Districts board to represent the interests of the state in litigation.

Thus, our decision in *Baker* is consistent with Texas law, which provides that "either the Attorney General or a county or district attorney may represent the State in a particular situation." *See Hill v. Texas Water Quality Board*, 568 S.W.2d at 741. The majority opinion, on the other hand, ignores Texas law when it refuses to recognize that "these are the only choices." *Id.* Unlike the majority, then,

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[26](...continued)

> insufficient to demonstrate that the system is illegal, but they cannot make it fair or right. The status quo is unjust and inequitable.

H.J. OF TEX., 73d Leg., R.S. 479, 482 (1993) (Address of Chief Justice Thomas R. Phillips); *see also id.* at 481 ("One thing can be said with confidence about our current system of choosing judges: No one likes it.").

I would hold that the Attorney General has the exclusive authority to represent the interests of the state in this litigation.

3. **The Attorney General's Power to Settle on Behalf of the State**

The majority's failure to perceive the nature of this lawsuit, as well as its failure to understand the broad and exclusive powers of the Texas Attorney General, ultimately leads it to suggest that the Attorney General in this case has acted beyond his authority in approving the settlement and asking for a remand. I reject this suggestion.

In *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991), seven of nine members of the Texas Supreme Court rejected a similar argument. In particular, they rejected an argument that the Attorney General lacked the power to negotiate and execute a settlement agreement on behalf of the state. A plurality of the court, consisting of Justice Hecht, Chief Justice Phillips, and Justice Cook, reasoned as follows:

> The Attorney General, as the chief legal officer of the State, has broad discretionary power in conducting his legal duty and responsibility to represent *the State*. *This discretion includes the authority to propose a settlement agreement in an action attacking the constitutionality of a reapportionment statute*. The Attorney General has participated in such settlements on previous occasions. Although the Attorney General appears to have acted throughout this litigation only on behalf of the state defendants and not for himself, he had the authority, certainly for his clients and *even on his own*, to suggest possible remedies after the district court rendered an interlocutory summary judgment holding Senate Bill 31 unconstitutional. He also *had the power to negotiate a settlement with the plaintiffs and to execute an agreement with them*. To hold that he did not would be to give him less authority than any party or any other attorney participating in the case.

Id. at 721-22 (internal citations omitted) (emphasis added). Justice Hightower and Justice Gammage, dissenting on other grounds, recognized that the "Attorney General, in carrying out his constitutional responsibility to represent the interests of the state, has discretionary power to settle lawsuits on behalf of the state so long as he does not usurp the authority of a co-equal department of government." *Id.* at 753 (Hightower, J., joined by Gammage, J., dissenting). In a separate dissent, Justice Mauzy and Justice Doggett made similar statements about the Attorney General's power to settle lawsuits. *See id.* at 746-47 (Mauzy, J., joined by Doggett, J., dissenting). Thus, as Justice Mauzy correctly noted, seven justices agreed that "[t]he [A]ttorney [G]eneral is constitutionally empowered to execute a settlement agreement in litigation challenging a legislative redistricting plan." *Id.* at 747.

Consistently with the Texas Supreme Court's disposition in *Terrazas*, I would hold that the Texas Attorney General acted within his power as the chief legal officer of the state by executing the proposed settlement and, thereafter, by requesting a remand. This lawsuit is, for all practical purposes, a suit against the State of Texas, and the decisions by the Attorney General in this regard are quintessential decisions about how to protect the state's interests in litigation--decisions which, under Texas law, he is constitutionally empowered to make on behalf of the state.[27]

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[27] I recognize, of course, that the mere fact that the Attorney General has executed a settlement agreement on behalf of the state will not support the entry of a consent decree. The district court must hold a hearing on the propriety of the settlement and consider the objections of all interested parties. But the Plaintiffs and the State of Texas are not asking this court to enter a decree based on the specific settlement that the Attorney General negotiated and approved. Rather, they are only requesting a remand on the basis of the parties' expressed desire to settle this lawsuit.

(continued...)

B. *Who Must Consent to the Settlement?*

The majority also offers a second ground for refusing to remand the case for a hearing on the proposed settlement: that not all of the "defendants" have consented to the remand or to the settlement. In particular, the majority argues that, because the two intervening district judges, Judge Wood and Judge Entz, as well as Chief Justice Phillips, object to the settlement, the settlement could not be approved and therefore the case should not be remanded. Again, I disagree. In my view, by obtaining the consent of the Texas legislature, the Texas Attorney General did as much as (or perhaps more than) he was required to do under Texas law.

1. **Not the Intervening Judges**

Judge Wood and Judge Entz's objections to the settlement do not preclude a remand. The Supreme Court's decision in *Local Number 93, International Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), could not be clearer on this point. There, the court held that a union, who intervened as a matter of right, could not block

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[27](...continued)

I also am aware that, under Texas law, "[a]n admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state." TEX. GOV'T. CODE. ANN. § 402.004 (Vernon 1990). However, "the weight of authorities interpreting section 402.004 shows it to be a legislative limitation on the affirmative powers and discretion granted to the attorney general." *Texas Dep't of Human Servs. v. Green*, 855 S.W.2d 136 (Tex. App.--Austin 1993, n.w.h.). That is, the section has not been construed to limit the Attorney General's *constitutional* authority to propose, negotiate, and execute settlement agreements on behalf of the State of Texas--despite arguments to the contrary. *See Terrazas*, 829 S.W.2d at 728 n.5, 733 n.5 (concurring opinions of Justice Gonzalez and Cornyn); *see also Executive Condominiums, Inc. v. State*, 764 S.W.2d 899, 902 (Corpus Christi 1989, writ denied) (rejecting argument that section 402.004 prevented Attorney General from compromising and settling claims on behalf of the state).

the entry of a consent decree merely by withholding its consent to the settlement. The Court stated:

> It has never been supposed that one party--whether an original party, a party that was joined later, or an intervenor--could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearing on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.

Id. at 528-29.

Admittedly, a court may not enter a consent decree which has the effect of disposing "of the valid claims of nonconsenting intervenors." *Id.* at 529. Nor may a court "enter a consent decree that imposes obligations on a party that did not consent to the decree." *Id.* But these concerns are not implicated by the settlement proposed in this case.

The proposed settlement agreement in this case does not dispose of the "valid claims" of Judge Wood and Judge Entz. They are only *permissive* intervenors. *See New Orleans Public Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir.), *cert. denied*, 469 U.S. 1019 (1984); *see also Clements v. League of United Latin American Citizens*, 884 F.2d at 187 (equating intervenor of right with "real party in interest"). As such, they do not have the status of an original party.[28] Moreover, as I read the record, they were

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[28] Indeed, in the context of discussing the rights of a permissive intervenor, this court has stated:

> [T]he [permissive] intervenor's mere presence in an action does not clothe it with the status of an original party. To be sure, there are some senses in which an "intervenor is treated as if he were an original party and has equal standing with the original parties." The permissive intervenor can, among other things, move to dismiss the proceeding

(continued...)

permitted to intervene only to protect their tenure as sitting elected judges.[29] Thus, although I agree with the majority

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[28](...continued)

> and can challenge the subject matter jurisdiction of the district court. But these participatory rights remain subject to the *intervenor's threshold dependency on the original parties' claims*, for it is equally well-settled that "[a]n existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit."

Harris v. Amoco Production Co., 768 F.2d 669, 675 (5th Cir. 1985) (emphasis added) (internal citations omitted), *cert. denied*, 475 U.S. 1011 (1986); *see also Kirkland v. New York State Dep't of Correctional Servs.*, 711 F.2d 1117, 1126 (2d Cir. 1983) ("[T]he sum of rights possessed by an intervenor, even if granted unconditional intervention, is not necessarily equivalent to that of a party in a case and depends upon the nature of the intervenor's interest."), *cert. denied*, 465 U.S. 1005 (1984).

[29] The majority concludes that Judge Wood and Judge Entz were also permitted to intervene in their capacity as voters of Harris and Dallas county. The record belies this conclusion.

In her motion to intervene filed in the district court, Judge Wood asserted:

> As a state district judge, duly elected at large in November, 1988, to a four-year term of office in an expressly targeted county, Harris County District Judge Wood has a direct and substantial interest in the outcome of this suit in both her personal and her official capacity in that she stands to have here election declared null and void and her tenure in office drastically truncated should Plaintiffs obtain the relief they seek.

In support of her motion, Judge Wood cited *Williams v. State Board of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988), a case dealing specifically with whether sitting elected judges should be joined as necessary parties in a section 2 case challenging judicial elections. At no point in her motion, or in her supporting memorandum, does Judge Wood assert that she is entitled or should be allowed to

(continued...)

that the intervening judges do not, at this time, have to independently satisfy article III standing requirements,[30]

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[29](...continued)
intervene as a voter. In fact, she does not allege that she is a registered voter of Harris County. Thus, unlike the majority, I cannot say that she was permitted to intervene as a registered voter.

In his motion to intervene, Judge Entz similarly focuses his arguments on why he should be allowed to intervene as a sitting elected judge of Dallas County. He also alleges that he is a resident of Dallas County and is duly qualified and registered to vote in the county. He then states, that "as such" he has an "interest in the fair administration of justice in Dallas County and the selection of a qualified judiciary." However, in his supporting memorandum, he never again mentions his status as a voter. Rather, like Judge Wood, he relies solely on the *Williams* case to support his motion to intervene. Therefore, I am unable to conclude that he was permitted to intervene to protect his interest--if, indeed, he has any such interest--in voting for all of the judges in Dallas County.

[30] Had the Attorney General moved to dismiss the notice of appeal filed on behalf of the State of Texas, however, we might be presented with another situation entirely. *See Diamond v. Charles*, 476 U.S. 54 (1986). The majority does not think so, but, in my view, there are serious questions about whether Judge Wood and Judge Entz, as sitting elected judges, would have standing to maintain an appeal from an order which only declares the current method of electing judges to be illegal. Moreover, even assuming that they were allowed to intervene as registered voters, I have reservations about the correctness of the Eleventh Circuit's decision in *Meek v. Metropolitan Dade County*, 985 F.2d 1471 (11th Cir. 1993), which held that voters had standing to intervene and independently appeal from a district court's decision declaring Dade County's at-large election scheme invalid. The question in such cases is *not* whether white voters such as Judge Wood and Judge Entz, who seek to defend the status quo, would have standing to file a claim under section 2, but whether they would have standing to attack the order of the district court--that is, whether they have suffered an injury in fact as a result of the district court's *liability decision*. *See Sierra Club v. Babbitt*, 995 F.2d 571 (5th Cir. 1993) ("Where standing to appeal is at issue, (continued...)

their mere status in this lawsuit as permissive intervenors does not, in my view, serve to give them "claims" or "defenses" in the sense contemplated by *Firefighters*.

Nor does the proposed settlement place any "obligations" on Judge Wood or Judge Entz. On the contrary, the settlement has absolutely no effect on either the tenure of these judges or the manner in which they will be elected in the future. In addition, they are not directed to do anything under the proposed settlement. *Compare Chisom v. Roemer*, 970 F.2d 1408 (where settlement at issue required the Louisiana Supreme Court to temporarily assign judge elected to newly created court of appeals position to the Supreme Court), *appeal dismissed by*, 975 F.2d 1092 (5th Cir. 1992).

Unlike the majority, therefore, I do not think that the intervening judges have to power to block the motion to remand or the entry of the proposed settlement in this case. As permissive intervenors, they have no "claims" or "defenses" that are adjudicated by the proposed settlement. And even a cursory reading of the proposed settlement reveals that it does not impose obligations or duties on the intervening judges. Thus, under *Firefighters*, their withholding of consent to the motion to remand is simply irrelevant.

2. **Not Chief Justice Phillips**

I would also hold that Chief Justice Phillips' objections to this particular settlement do not preclude a remand. As explained earlier, I do not view this lawsuit as being one against the various named officials, but rather, as one against the State of Texas. And because the Attorney General is the exclusive representative of the state in such matters, the consent of Chief Justice Phillips is not required.

The Austin appellate court's decision in *Bullock v.*

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[30](...continued)
appellants must demonstrate some injury *from the judgment below*.") (emphasis in original).

Texas Skating Ass'n, which was cited with approval by the plurality opinion in *Terrazas*, is particularly instructive. In this tax refund case, the plaintiff, who had prevailed in the lower court, argued that the Attorney General's notice of appeal should be dismissed because one of the Attorney General's "clients"--namely, the Comptroller--had instructed the Attorney General not to file a notice of appeal from the adverse decision. In denying the plaintiff's motion as meritless, the *Bullock* court first described the status of the various named defendants. It stated, "The Attorney General is a defendant in suits of this type in the same manner that the Comptroller and the Treasurer are *jurisdictional parties*, although the State of Texas is the *actual party* in [a] suit to recover taxes." 583 S.W.2d at 894. The court then rejected the plaintiff's argument that "the Comptroller, in the exercise of his administrative duties, such as tax refunds, can bring litigation to a halt at any time." *Id.* It explained:

> In this suit the Comptroller obviously exercised his administrative discretion and rejected [the plaintiff's] request for refund of taxes paid under protest; otherwise there would have been no litigation. Thereafter, upon filing of suit, the Comptroller's statutory powers ended. In matters of litigation the Attorney General is the officer authorized by law to protect the interests of the State, and even in matters of bringing suit the Attorney General must exercise judgment and discretion, which will not be controlled by other authorities. It was within the discretion of the Attorney General, not that of the Comptroller, to decide whether to appeal a case in which the State had experienced an adverse judgment in the trial court. In such matters the Attorney General, not the Comptroller of Public Accounts, is authorized to perform the duties of the State's attorney. The motion to dismiss the appeal is overruled.

Id. (internal citations and quotation marks omitted).

Like the majority, I think that the decision to settle a lawsuit is, for all practical purposes, indistinguishable from

the decision to file (or not to file) a notice of appeal. Unlike the majority, however, I also think that the Attorney General's decision on these issues controls--at least when it does not conflict with the view of another appropriate representative of the state. *See supra* Part II.A.2 (discussing *Baker v. Wade*). Thus, I do not think that Chief Justice Phillips, who is at most a "jurisdictional party,"[31] must consent to a remand before the motion to remand is granted.[32]

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[31] As discussed *supra* Part I.A.1., Chief Justice Phillips was apparently named as a *Young* defendant--in order to get around the Eleventh Amendment bar to suits brought directly against the state. To come within the rule of *Young*, however, the officials who are named as defendants "must have some connection with the *enforcement*" of the state law being challenged. *See Young*, 209 U.S. at 157 (emphasis added). Otherwise, the named official has only been made "a party as a representative of the state" in an "attempt[] to make the state a party." *Id.* When officials who are not charged with enforcing the challenged state law are joined as parties, therefore, the proper course is dismissal.

Assuming section 2 does not waive a state's Eleventh Amendment immunity, the Plaintiffs correctly named the Texas Attorney General and the Secretary of State in their official capacities. After all, both are responsible for enforcing the current method of electing district court judges. However, the members of the Texas Judicial Districts Board (including Chief Justice Phillips), have *legislative* responsibilities--responsibilities that arise only if the Texas legislature fails to act. *See* TEX. CONST. art. 5 § 7a(e). They have no enforcement responsibilities whatsoever. Thus, in my mind there is a question as to whether the Plaintiffs' action against the members of the Judicial Districts Board, including Chief Justice Phillips, are barred by the Eleventh Amendment.

[32] I recognize, of course, that the district court would have to conduct an evidentiary hearing on the proposed settlement and that Chief Justice Phillips' objections to the proposed settlement would have to be fully aired. The point is that, at this time, all the parties are seeking is a remand; they are not seeking this court's stamp of approval on the current proposed settlement.

3. **Perhaps the Texas Legislature**

In concluding that neither the consent of the intervening judges nor the consent of Chief Justice Phillips is required, I am not unmindful of the potential for state law separation of powers problems in cases like these. *See Terrazas*, 829 S.W.2d at 720. Nor was the Attorney General unmindful of the potential for such problems in this case. This is why he sought and obtained approval of the proposed settlement from both houses of the Texas legislature.

The majority suggests that, because the Texas legislature could not enact the proposed settlement into law, its less formal approval of the proposed settlement is meaningless. I disagree. The Texas Senate, acting as a Committee of the Whole (which is authorized by Texas law), expressed its approval of the proposed settlement in the form of a resolution. The Texas House similarly approved the proposed settlement through a resolution. Both of these resolutions were "official" expressions of the Texas legislature's position on the question of whether this case should be settled.

In my view, these resolutions only reinforce the conclusion that the State of Texas has consented to a remand and to entry of the proposed settlement. That two intervening judges and Chief Justice Phillips, none of whom was elected to represent the state in matters of litigation, do not consent, only serves to highlight the extent to which this lawsuit has become politicized. Their failure to consent does not, however, preclude a remand or the entry of a settlement agreement.

C. *Can the Proposed Settlement Override State Law?*

Finally, the majority declines to remand this case because the proposed settlement is inconsistent with state law--specifically, the provision of the Texas Constitution that allows judicial districts to be drawn smaller than a county, but only with the approval of the voters of the county. *See* TEX. CONST. art V, § 7a(i). The majority holds that, without a final, non-appealable decision finding a section 2 violation,

voting rights cases cannot be settled in a way that is inconsistent with state law. Once again, I must disagree.

The majority argues that in *Chisom v. Roemer*, 970 F.2d 1408, 1409 (5th Cir. 1992), where we remanded a case similar to this, we were able to remand because the parties brought with them a duly enacted state law. Even assuming that the settlement proposed in *Chisom* was entirely consistent with state law--a matter upon which we expressed no opinion[33]--there is a crucial distinction between this case and *Chisom*: In *Chisom*, the district court had found no section 2 liability; in this case, by contrast, the district court found that the Texas' method of electing district court judges in county-wide elections violated section 2 in each of the nine target counties.

I think the district court's section 2 liability findings provide a sufficient basis for remanding the case for a hearing on the proposed settlement. Of course, I agree with the majority that the district court would not be able to "merely sign on the line provided by the parties." *See United States v. City of Miami, Florida*, 664 F.2d 435 (Former 5th Cir. 1981) (en banc). Given the detailed section 2 findings already made by the district court, however, I do not think that the settlement's apparent inconsistency with state law is a reason to deny the motion to remand.

Our decision in *Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984), rather than arguing against a remand, suggests that a remand may be particularly appropriate in

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[33] An argument can be made that the settlement proposed in the *Chisom* case--a settlement which had the effect of temporarily adding an eighth seat to the Louisiana Supreme Court--offended the Louisiana Constitution. *See* LA. CONST. art. V, § 3 ("The supreme court shall be composed of a chief justice and six associate justices, four of whom must concur to render judgment."). As the majority correctly notes, Louisiana's effort to amend the constitution to add an extra position had failed. *See* Majority Opinion at 30 n.19. The point is that, before remanding, we never considered this question in *Chisom*.

this case. There, we refused to mandamus a district court to enter a proposed consent decree based on a settlement between minority plaintiffs and the City of Austin. We noted that, at the time the settlement was presented for approval, *no evidence of vote dilution* had been presented to the district court. In holding that the district court did not abuse its wide discretion in refusing to enter the consent decree, we concluded that the parties were effectively trying to accomplish a result--namely, the amending of Austin's City Charter--which they did not have the power to do without a vote of the people. We stated:

> Thus, more is necessarily involved than merely ascertaining whether the parties have consented to an ultimate result which is not of itself illegal, unreasonable or unfair. *Absent a properly grounded judicial determination* that the present charter provisions are illegal, the consent of the parties provides an insufficient basis on which to judicially ordain a different system of council election and composition.

748 F.2d at 956-57 (emphasis added).[34]

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[34] Our discussion in *Overton*, happily enough, is consistent with the Texas Supreme Court's decision in *Terrazas*. In that case, a plurality of the members of the Texas Supreme Court recognized that a state district court could enter a consent decree, based on a settlement between the Attorney General and the plaintiffs, which effectively reapportioned the state legislative districts. It noted, however, that the entry of such a consent judgment required some procedural regularity (i.e., the state district judge would have to carefully consider the many interests involved, give due deference to the legislature to rectify its own statutes, and give due regard for the effect of the order on the election process). *See* 829 S.W.2d at 718. The plurality in *Terrazas* also suggested that court-ordered reapportionment based on such a settlement would be prohibited absent a judicial determination that the current statute was invalid. *See id.* at 722. Once there is a judicial determination that the current statute is invalid, under the plurality opinion in *Terrazas*, a state

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When the parties in this case presented their motion to remand, the case was in a very different posture than the one in *Overton*. There had been lengthy trial, during which time the Plaintiffs presented substantial evidence of vote dilution. Moreover, the only decision which still stood was the district court's--i.e., the one holding that Texas' method of electing district judges in at-large, county-wide elections operates in the nine target counties to dilute minority voting strength. In my view, this decision constitutes a "properly grounded judicial determination" that the current system is illegal. It was based on the evidence presented at trial and represents a reasonable interpretation of that evidence. This finding should be sufficient under *Overton* to allow the parties to effectuate a settlement they otherwise would not have the authority to bring about under state law.

Also, because this settlement has been approved by a majority of both houses of the Texas legislature, I think that the motion to remand should be taken more seriously than the majority sees fit to do. In confronting an analogous situation in *Wise v. Lipscomb*, 437 U.S. 535, 548 (1978), the Supreme Court approved the decision of the Dallas City Council to reapportion itself in response to a district court finding that the then-existing at-large election system violated the Constitution--despite the fact that the city council appeared to lack the power to do so under state law. In a concurring opinion, four Justices explained why a federal court was required to show deference to the plan:

> The essential point is that the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court

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[34](...continued)
district court would be able to enter a consent decree based on a settlement agreement executed by the Attorney General. In short, neither *Overton* nor *Terrazas* requires a final, non-appealable finding of liability before a court can override a provision of state law.

> . . . . This rule of deference to local legislative judgments remains in force even if . . . our examination of state law suggests that the local body lacks the authority to reapportion itself.

Id. at 548. (Powell, J., concurring, joined by Burger, C.J., Blackmun, and Rehnquist, JJ.). Although the resolutions passed by the Texas legislature in this case do not have the force of law, they do represent an official expression of the "elected representatives of the people" of Texas on the questions of whether and how this case should be settled.

Ultimately, the majority is able to rely on the settlement's apparent inconsistency with state law as a ground to deny the motion to remand because it is convinced "there is no [section 2] case" here. Even a cursory review of the record in this case discounts the majority's characterization of the Plaintiffs' evidence of vote dilution. *See generally supra* Part I. But the majority's statement does reveal something about its real motivation for denying the motion to remand: its unwavering desire to reach the merits of this case so that it can overhaul the Voting Rights Act.

D. *The Implications of the Majority's Decision to Deny the Motion to Remand*

In sum, the majority offers three reasons why the motion to remand filed by the State of Texas and the Plaintiffs in this case must be denied. None is persuasive. The majority cannot seriously argue that the Attorney General has exceeded his authority or that he has somehow failed in his duty to represent the interests of the State of Texas. And, although the majority correctly notes that not all of the nominal "defendants" have joined in the motion to remand, it offers no reason why the case cannot be remanded without the consent of the intervening judges and Chief Justice Phillips. Finally, the majority is able to rely on the fact that the proposed settlement is inconsistent with Texas law only by reaching the merits of the underlying section 2 dispute--and reversing the district court on clearly erroneous grounds.

The majority's rationale for denying the motion to

remand will discourage, if not prohibit, the settling of most voting rights cases. It will effectively require the consent of all of the various named officials, as well as any party who, for whatever reason, has been permitted to intervene. And, in most cases, it will require a final, non-appealable decision that there is a section 2 violation. That is, under the majority's reasoning, a state may effectively be forced to defend an election system, even when its chief legal officer thinks that the system runs afoul of the Voting Rights Act, unless there is a conclusive determination by the Supreme Court that the system does indeed violate section 2. Somehow, I do not think this is consistent with our policy of encouraging settlements in other areas of the law.

Moreover, the majority's rationale for denying the motion to remand places a premium on judicial efficiency. The majority concludes that, based upon the evidence the Plaintiffs' adduced at trial, no reasonable district court could enter a consent decree that would override provisions of Texas law. Of course, in making this conclusion, the majority necessarily tramples upon other judicial values that are equally, if not more, important--namely, the values of judicial restraint and federalism. It also turns a deaf ear to the one voice in this lawsuit who is authorized to speak on behalf of the State of Texas, the Attorney General, and ignores the Texas legislature's official expression of its desire to see this case settled.

Instead of elevating judicial efficiency above these other values, I would grant the motion to remand. In doing so, I would express no opinion on the proposed settlement, but would instruct the district court that it should carefully consider the objections of the intervening judges, Chief Justice Phillips, and other interested parties. I would also instruct the district court that, in deciding whether a settlement can override state law, it must consider all evidence relevant to the question of whether there is a section 2 violation, including the state's valid interests in maintaining the current system.

Admittedly, this course of action might eliminate our

opportunity to address many of the new, burning questions about the framework for deciding section 2 cases. But that is not the duty of an Article III court. Rather, as the majority notes, "[o]ur job is to decide a case or controversy." Majority Opinion at 27. Where the plaintiffs and the defendant in a case have expressed a desire to settle their dispute, I think that principles of judicial restraint require us to give them the opportunity to do so.

WIENER, Circuit Judge, dissenting.

I respectfully dissent. In so doing I join the dissent of Chief Judge Politz in the belief that we judge best when we judge least, particularly in controversial matters of high public interest to the several states. If forced to take a position on the merits of this, the second en banc consideration of the case, I would regrettably find it impossible to concur in the reasoning of Judge Higginbotham's majority opinion or Judge Jones' concurring opinion. For me those writings simply do not "hang together." I would therefore reach the same conclusion as does Judge King in her dissent—and for most if not all of the same reasons.

[Panel Decision of the Court of Appeals on Remand January 27, 1993]

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, COUNCIL NO. 4434,
Plaintiffs-Appellees,
and
Jessie Oliver, et al., Intervening Plaintiffs-Appellees,
v.
William P. CLEMENTS, etc., et al., Defendants.
Jim MATTOX, et al., Defendants-Appellees, Appellants,
v.
Judge F. Harold ENTZ, etc., Judge Sharolyn Wood, etc., and George S. Bayoud,
Jr., etc., Defendants-Appellants,
and
Tom Rickhoff, Susan D. Reed, John J. Specia, Jr., Sid L. Harle, Sharon Macrae
and Michael P. Pedan, Bexar County, Texas State District Judges, Appellants.
No. 90-8014.
United States Court of Appeals,
Fifth Circuit.
Appeals from the United States District Court for the Western District of Texas.
On Remand from the United States Supreme Court
January 27, 1993

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Before KING, JOHNSON and HIGGINBOTHAM, Circuit Judges.

KING, Circuit Judge:

This case is before us on remand from the Supreme Court's decision in *Houston Lawyers' Association v. Attorney General of Texas*, ___ U.S. ___, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991), in which the Court held that Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, applies to all Texas judicial elections. We must now address a question that is undoubtedly easier to frame than to answer. In particular, we must decide whether the district court erred in concluding that the method by which Texas elects district court judges —as that method operates in nine counties— violates Section 2 of the Voting Rights Act. After a careful review of the record, we hold (1) that the district court correctly concluded, in eight of the counties at issue, that Texas' method of electing district court judges violates Section 2, but (2) that the district court erred in finding a Section 2 violation in Travis County. We therefore affirm the district court's decision in part, reverse the decision in part, and remand the case to the district court for consideration and imposition of an appropriate remedy.

In view of the length of this opinion,[1] a summary of the pertinent facts and major legal conclusions may be helpful to the reader:

As with all cases under the Voting Rights Act, this one

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[1]An explanation for the length of this opinion is in order. This case was tried and decided in 1989. Since then, it has taken an unexpected detour to the Supreme Court and back. We recognize that this panel may well not have the last appellate word. The parties and amici have filed briefs totalling nearly 1200 pages and have raised an extraordinarily large number of issues in what is, in reality, nine separate Voting Rights Act cases. This opinion attempts to address all the issues raised, with the hope of facilitating the ultimate resolution of the case and minimizing the need for further consideration at our level of issues already briefed.

is driven by the facts. In this case, certain key facts are best summarized by the following table which sets forth, with respect to each of the nine Texas counties at issue, the population of the relevant minority group, the total number of district court judges elected in the county, the number of judges who are members of the relevant minority group and the percentage of the total number of district judges who are members of the relevant minority group.

County	Relevant Minority Population[a]	Total no. of district judges[b]	Number of judges who are members of the relevant minority group[c]	Percentage of judges who are members of relevant minority group
Bexar	46.6% Hispanic	19	5	26.3%
Dallas	18.5% Black	36	2[d]	5.5%
Ector	26.0% Black & Hispanic	4	0	0.0%
Harris	19.7% Black	59	3	5.1%
Jefferson	28.2% Black	8	0	0.0%
Lubbock	27.0% Black & Hispanic	5	0	0.0%
Midland	23.5% Black & Hispanic	3	0	0.0%
Tarrant	11.8% Black	23	2[e]	8.7%
Travis	17.2% Hispanic	13	0	0.0%

a. This data was taken from the 1980 Census.

b. These numbers reflect the total number of district judges elected in county as of 1989.

c. These figures represent the number of judges who were on the bench in 1989.

d. These two Black judges were elected with virtually no support from Dallas County's Black community.

e. One of these Black judges was elected with very little support from the Black community in Tarrant County, and the other judge obtained her seat through appointment.

The table portrays graphically what is inescapable from the record in this case—that in Texas district court elections, minority voters have less opportunity than white voters to participate in the political process and to elect representatives of their choice. The powerlessness of Texas minority voters in state district court elections stands in marked contrast to the increasing ability of those voters to participate in the political process and to elect representatives of their choice in the context of federal and state legislative elections and in local city council and school board elections. The strides that minority voters have made in the latter elections are due in no small part to the Voting Rights Act. In the years following the passage of the Act, minority plaintiffs throughout the state mounted successful challenges under Section 2 to at-large election schemes for the federal and state legislative branches and for local city councils and school boards. Thus, the face of this state's legislative branch and of local government more and more reflects the face of this state's people. By contrast, the face of the judicial branch in Texas continues to be—as it has always been—overwhelmingly white.

The state of Texas and the other defendants argue that the Voting Rights Act, so helpful to minorities in these other contexts, affords minorities no relief in the context of the election of state district judges. This is so, we are told, because the state has a compelling interest in the maintenance of the present electoral system—an interest which outweighs the interest of minorities in having an opportunity equal to that of the state's white citizens to elect district judges of their choice. Specifically, we are told by the state that electing district judges from an area no smaller than a county is necessary to ensure that district judges are independent or accountable to all litigants equally and that no particular group will have undue influence over the decisions that must be made alone by the district judge. We are told further that the mechanism by which that interest is implemented is the state's venue rules which operate to ensure the accountability of a state district judge to all the

citizens of the county in which he is elected. Upon close inspection, we find, not surprisingly, that the venue rules in Texas, like the venue rules in the federal courts and in the courts of other states, are predicated on considerations of convenience for the litigants and the witnesses; in general, they afford a defendant some protection from being forced to defend an action in a district court remote from his residence in this vast state, or remote from the place where the events underlying the controversy occurred and the place where evidence is most likely available. In short, here as elsewhere, the venue rules were not designed to ensure judicial accountability.

What does ensure that state district judges are independent and accountable to all litigants equally and that no particular group will have undue influence over the decisions that must be made are—first, the Texas Code of Judicial Conduct and second, the integrity of the individual judges. The Texas Code of Judicial Conduct charges judges with applying the law and states that an honorable judiciary separated from the influence of others is "indispensable to justice in our society." The Code also stresses that "[a] judge should be unswayed by partisan interest, public clamor, or fear of criticism." There is no evidence in this record that judges elected with the support of minorities will be any less obedient to the commands of the Texas Code of Judicial Conduct than are state district judges who are currently elected with the support of many other interest groups, such as the personal injury bar and the defense bar. Nor is there any support in this record for the proposition that persons elected with the support of minorities would somehow be lacking in the same high level of integrity that has in the past characterized the Texas bench.

In summary, the compelling interest proffered by the state and the other defendants for the maintenance of the current system is, at best, little more than tenuous. Arrayed against it is the Texas Constitution, which was amended by the Texas legislature and by the voters of this state in 1985 to permit the election of state district judges from areas

smaller than a county. The voters of this state have made provision for one of the remedies available to the district court in this case—namely, the remedy of subdistricting. Surely, the legitimate state interests in this case can permissibly be defined, in part, by this provision of its Constitution.

We turn finally to a brief summary of certain other important legal issues involved in the decision of this case. In particular, we have been asked by the state of Texas and several state district judges to decide what Congress meant in the Voting Rights Act when it prohibited voting practices that result in a denial or abridgement of the right to vote "on account of race or color."

With respect to the significance of Congress' use of the phrase "on account of race" in Section 2, our holdings may be summarized as follows: First, we hold that, under the plain language of Section 2, minority plaintiffs must demonstrate that the challenged election practice, under the totality of the circumstances, results in the denial or abridgement of the right to vote "on account of," or based on, race or color. *See Chisom v. Roemer*, ___ U.S. ___, ___, 111 S.Ct. 2354, 2363, 115 L.Ed.2d 348 (1991). The phrase "on account of race or color" has been broadly defined by the Supreme Court and by Congress. Specifically, the totality of circumstances factors listed by Congress as relevant to a determination of Section 2 liability, as well as the threshold factors for proving vote dilution set forth in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), point to minority voters' unequal opportunity to participate in the political process on the basis of race or color. Thus, minority plaintiffs seeking to satisfy the "on account of race or color" requirement—which is indisputably their burden—may present evidence of the existence of racially polarized voting, racial campaign appeals, a history of official discrimination, the lingering socioeconomic effects of discrimination, and other features of the current or past racial climate of the community in question. Proof of some or all of these factors raises an inference that racial

discrimination is responsible for minority plaintiffs' unequal opportunity to participate in the political process.

Therefore, we reject the argument that "on account of race or color" is a narrowly-defined phrase. In particular, we reject the contention that Congress has defined the phrase "on account of race or color" to require minority plaintiffs to present proof that their unequal opportunity to participate in the electoral process and elect representatives of their choice is "caused by racial animus in the electorate." We also reject the related argument that, to prove legally significant white bloc voting in the context of partisan elections, as well as racially polarized voting in such elections, minority plaintiffs must prove that such voting patterns are caused by racial animus in the electorate. While proof of the presence of racial animus in the electorate would be a significant factor indicating that race or color is in some way responsible for minority plaintiffs' unequal opportunity to participate in the electoral process, the absence of proof of racial animus in the electorate simply will not, by itself, preclude a finding that minority plaintiffs have an unequal opportunity to participate in the electoral process on account of race or color.

We have also been asked to decide whether evidence of a strong statistical correlation between the electoral success and the party affiliation of a candidate can override or negate other factors which Congress has indicated point towards vote dilution. With respect to the evidence in several of the counties at issue showing a strong statistical correlation between a candidate's electoral success and his or her party affiliation, we hold that the district court erred in refusing to consider the evidence. The evidence is unquestionably relevant as an important feature of the political landscape. And, to the extent the evidence purported to demonstrate the absence of current racial animus in the electorate, it was also relevant to the question of whether race or color is responsible for the minority plaintiffs' unequal opportunity to participate in the political process.

We further hold, however, that the district court's failure to consider the particular evidence adduced in this case amounts to harmless error. The so- called "partisanship evidence" in this case was offered to demonstrate only that voters in elections in large Texas counties, not knowing the race or names of district court candidates, vote without specific racial animus toward those candidates. The evidence did not purport to explain why voters voted the way they did, but simply purported to rule out specific racial animus towards candidates. Moreover, to the extent that minority candidates find it harder, because of their lack of financial resources, to mount a county-wide campaign on a scale necessary to gain name recognition, the partisanship evidence of straight-ticket voting reinforces rather than negates minorities' unequal opportunity to participate in the political process. Accordingly, we hold that, although it should not have been excluded from consideration as legally irrelevant, the partisanship evidence adduced here does not undercut the district court's ultimate conclusion that minorities have an unequal opportunity to participate in the political process, an unequal opportunity that is tied to race or color.

I. BACKGROUND

This lawsuit, which is before this panel for a second time, encompasses nine different voting rights cases. It concerns the method by which Texas elects its district court judges in Bexar, Dallas, Ector, Harris, Jefferson, Lubbock, Midland, Tarrant, and Travis counties ("target counties"). Before we recount the procedural history of this lawsuit, it will be helpful to outline Texas' method of electing district court judges and to describe how this method operates in the larger counties of the state.

A. Texas' Method of Electing District Court Judges

Texas elects its 386 state district judges in partisan elections, which are conducted at the same time and in a substantially similar fashion as other state partisan races. Political parties nominate judicial candidates in general primaries and runoffs, and a candidate must receive a

majority of the vote to qualify as the party's nominee. See TEX.ELEC.CODE ANN. § 172.003 (Vernon 1986). At the general election, judicial candidates must run for a specifically numbered district court, and their party affiliation is indicated on the ballot. To win the general election, a judicial candidate needs only a plurality of votes. *Id.* § 2.001.

One feature of Texas' method of electing state district judges is unique—the size of the various judicial districts from which such judges are elected. Since 1985, the Texas Constitution has provided that judicial districts may not be smaller than a county unless a majority of the voters of the county authorizes smaller districts, see TEX. CONST. art. V, § 7a(i), and to date, no district smaller than one county has been authorized by voters from any Texas county.[2] In addition, although the Texas Constitution permits the creation of more than one judgeship per judicial district, see TEX. CONST. art. V, § 7, the legislature has seldom invoked this provision. Consequently, as a general rule only one district judge is elected per judicial district, and the judicial districts, although no smaller than a county, vary in size from one county to six counties and in population from approximately 13,000 to 2.5 million. See generally THE AMERICAN BENCH 2138-54 (6th ed. 1991) (breaking down judicial districts in Texas according to the counties they cover).

Thus, Texas' method of electing district court judges operates as an at-large system in the larger counties—including the nine target counties—but not in the smaller counties. For example, in Harris County, which according to the 1980 Census has a population of some 2,409,544, there are fifty-nine (59) overlapping, single-judge,

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[2]Stated another way, the Texas Constitution was amended in 1985 to provide for the first time that a county may subdivide itself into smaller judicial districts than the full extent of the county; such action requires a majority vote of the county.

county-wide judicial districts. The persons running for those 59 positions may be voted on by all 1,685,024 registered voters in Harris County. By contrast, in Milam County, which according to the 1980 Census has a population of 22,732, there is only one judicial district. The registered voters in that county cast their ballots for only one district judge. See *id.*

B. Procedural History

On July 11, 1988, ten individuals, along with local and state chapters of the League of United Latin American Citizens (collectively, "Plaintiffs"), filed suit in federal district court, seeking declaratory and injunctive relief. Plaintiffs asserted that Texas' method of electing district court judges, as that method operates in larger counties, (1) dilutes minority voting strength in violation of Section 2 of the Voting Rights Act, and (2) violates the Fourteenth and Fifteenth Amendments of the United States Constitution. The named defendants in the original lawsuit were: William P. Clements, the Governor of Texas; Jim Mattox, the Attorney General of Texas, who is charged with enforcing the laws of the state; George Bayoud, the Secretary of State of Texas, who is charged with administering the elections laws of the state; and members of the Judicial Districts Board of Texas, which is charged with reapportioning the districts from which Texas district court judges are elected (collectively, "State Defendants").

Several months later, in March 1989, the district court permitted several parties to intervene in the lawsuit. The Houston Lawyers Association and the Texas Black Legislative Caucus intervened on behalf of Plaintiffs, as did certain individuals residing in Dallas County. Two Texas district court judges—Sharolyn Wood, 127th District Court in Harris County, and Harold Entz, 194th District Court in Dallas County—intervened in their personal capacities on behalf of the State Defendants.

Plaintiffs originally challenged Texas' election method in forty-four counties. By the time of trial, however, they had narrowed their challenged to the nine target counties.

Plaintiffs proceeded on behalf of Black voters in Harris, Dallas, Tarrant, and Jefferson counties, on behalf of Hispanic voters in Bexar and Travis counties, and on behalf of Black and Hispanic voters combined in Lubbock, Ector, and Midland counties.

The lawsuit was tried to the district court the week of September 18, 1989. After considering all the evidence, including much expert testimony, the district court rendered its liability decision and made findings of fact and conclusions of law. In its 94-page memorandum opinion of November 8, 1989, the district court rejected the Plaintiffs' constitutional claims but found their statutory claim meritorious. The district court concluded that the Plaintiffs, on behalf of specified minority voters in each of the nine target counties, demonstrated a violation of Section 2 of the Voting Rights Act. The district court based its conclusion on its finding that Texas' current method of electing district court judges in the nine target counties "interacts with social and historical conditions" to cause the minority voters in each of the nine counties to have less opportunity than white voters "to elect their preferred candidates."

On appeal, a divided panel of this court held that the district court erred in concluding that Texas' method of electing district court judges violates Section 2 of the Voting Rights Act in the nine target counties. See *League of United Latin American Citizens v. Clements*, 902 F.2d 293 (5th Cir.), *opinion on rehearing en banc*, 914 F.2d 620 (1990), *rev'd and remanded*, ___ U.S. ___, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991). We reasoned that, although Section 2 applies to some state judicial elections, it does not apply to elections of state district judges. *Id.* at 308. In reaching this decision, we focused specifically on the legislative history of the Voting Rights Act, as amended in 1982, and the nature of Texas district court judgeships. We noted that, unlike a judge of a multi-member body, "the district judge in Texas does his judging alone." *id.* Because we concluded that "there can be no share of such a single member office," we held that county-wide elections of district judges "[do] not

violate the Voting Rights Act." *Id.* Accordingly, we reversed the judgment of the district court.

On its own initiative, the members of this court decided to rehear the case en banc. Over Judge Johnson's dissent, a majority of this court concluded that Section 2 of the Voting Rights Act does not apply to any judicial elections. See *League of United Latin American Citizens*, 914 F.2d 620, 631 (5th Cir.1990) (en banc), *rev'd and remanded*, ___ U.S. ___, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991). In reaching this conclusion, the majority relied primarily on Congress' use of the word "representative" in Section 2. It reasoned that Congress did not intend the term "representative" to include state judges. The majority stated: "Should Congress seek to install [the results] test for judicial elections, it must say so plainly. Instead, it has thus far plainly said the contrary." *Id.*

The Supreme Court granted certiorari for the limited purpose of considering the scope of Section 2's coverage. See *Houston Lawyers' Ass'n v. Attorney General of Texas*, ___ U.S. ___, ___, 111 S.Ct. 2376, 2380, 115 L.Ed.2d 379 (1991). Relying on its decision in *Chisom v. Roemer*, ___ U.S. ___, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991), which was issued the same day, the Court concluded that Section 2 of the Voting Rights Act applies to Texas' method of electing district court judges. *Id.* ___ U.S. at ___, 111 S.Ct. at 2381. The Court specifically held that "[i]f a State decides to elect its trial judges, as Texas did in 1861, those elections must be conducted in compliance with the Voting Rights Act." *Id.* at ___, 111 S.Ct. at 2380. Accordingly, the Court reversed this circuit's en banc decision and remanded the case for further proceedings.

II. THE ACCEPTED FRAMEWORK FOR ANALYZING SECTION 2 VOTE DILUTION CLAIMS

When Congress amended Section 2 of the Voting Rights Act in 1982, it sought "to clearly establish the standards ... for proving a violation of that section." S.REP. No. 417, 97th Cong., 2d Sess., at 2 (1982), reprinted in 1982 U.S.C.C.A.N.

177, 178 [hereinafter S.REP.].[3] Congress specifically intended to "make clear that proof of discriminatory intent is not required to establish a violation of Section 2." S.REP. at 2, 1982 U.S.C.C.A.N. at 178. Congress also intended to restore "the legal standards under the results test by codifying" the vote dilution framework embraced in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). *Id.* at 2, 1982 U.S.C.C.A.N. at 179.

As amended, Section 2 establishes the basic framework for analyzing vote dilution claims. It provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which

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[3]The Senate Report is the authoritative expression of Congress' intent in amending Section 2 of the Voting Rights Act. The House of Representatives did not draft its own report, nor did it negotiate a conference committee report. The House instead adopted the language of the Senate Report. Therefore, the Senate Report serves in place of a conference committee report and should be considered, next to the statute itself, the most persuasive evidence of congressional intent. See generally *Thornburg v. Gingles*, 478 U.S. 30, 43-46, 106 S.Ct. 2752, 2762-2764, 92 L.Ed.2d 25 (1986).

> members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. Subsection (a) makes clear that Congress intended to codify a results test, and subsection (b) provides guidance about how the results test is to be applied. *See Chisom*, ___ U.S. at ___, 111 S.Ct. at 2364. Under this framework, then, a plaintiff can prevail "by showing that a challenged election law or procedure, in the context of the total circumstances of the local electoral process, ha[s] the result of denying a racial or language minority an equal chance to participate in the electoral process." S.REP. at 16, 1982 U.S.C.C.A.N. at 193.

The basic framework set forth in the language of Section 2, although it appears straightforward, has become increasingly complex. Both the Supreme Court and Congress have elaborated on this basic structure, and the product of their elaborations is a two-part framework for analyzing vote dilution claims brought by minority voters. Under the first part of this accepted Section 2 framework, a court must determine whether the minority voters have satisfied a threshold test enunciated by the Supreme Court. If minority voters satisfy the threshold test and demonstrate that their ability to elect representatives of their choice is being hindered by the challenged practice, a court must then ask whether the minority voters have demonstrated certain factors that Congress deemed relevant to the Section 2 inquiry—factors that raise an inference of vote dilution. Ultimately, a court must inquire whether minority voters have demonstrated an unequal opportunity to participate in the political process on account of race or color.

A. The Threshold Inquiry: The *Gingles* Factors

The Supreme Court first elaborated on the basic analytical framework established by Section 2 in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986),

a case in which Black voters successfully challenged North Carolina's multimember legislative redistricting plan. Although the case produced a "complicated web of dissents, concurrences, and plurality opinions,"[4] a majority of the Court agreed that at-large election procedures do not automatically violate Section 2. *Id.* at 46, 106 S.Ct. at 2764. A majority of the Court also agreed with the formulation of a three-part, threshold test for analyzing claims that an at-large election scheme dilutes minority voting strength. Under this threshold test, the minority group challenging an at-large election scheme must demonstrate that (1) it is sufficiently large and geographically compact to constitute a majority in a single member district, (2) it is politically cohesive, and (3) the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances—usually to defeat the minority's preferred candidate. *Id.* at 48-51, 106 S.Ct. at 2765-2767. Failure to establish any one of the *Gingles* factors precludes a finding of vote dilution, because "[t]hese circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice...." *Id.* at 50, 106 S.Ct. at 2766; *see also Overton v. City of Austin*, 871 F.2d 529, 538 (5th Cir.1989) (failure to establish any one of the *Gingles* factors is fatal to plaintiffs' vote dilution claim).

1. *Size and Geographical Compactness of the Minority Group*

As stated above, to pass the *Gingles* threshold inquiry, the minority group challenging an at-large election scheme must first demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. To satisfy this first *Gingles* factor, the minority group must ordinarily be able to draw a single member district in which a majority of the voting age

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[4]Sushma Soni, Note, *Defining the Minority-Preferred Candidate Under Section 2*, 99 YALE L.J. 1651, 1653 (1990).

population is minority. *See Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109, 1117 n. 7 (5th Cir.1991) (*Westwego III*); *Overton*, 871 F.2d at 536; see also *Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201, 1205 n. 4 (5th Cir.1989) (*Westwego I*) (noting that evidence of size of "voting age" population is critical to a vote dilution claim); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir.1989) ("eligible minority voter population, rather than total minority population, is the appropriate measure of geographical compactness"). This requirement, according to the majority in *Gingles*, ensures that, in the absence of the multimember district and at-large voting scheme, "minority voters possess the potential to elect representatives...." *Gingles*, 478 U.S. at 50 n. 17, 106 S.Ct. at 2767 n. 17 (emphasis in original). In other words, if the minority group is not sufficiently large and geographically compact, "the multimember form of the district cannot be responsible for [minority] voters' inability to elect [their] candidates." *Id.* at 50, 106 S.Ct. at 2766 (emphasis in original) (footnote omitted).

2. *Political Cohesiveness of the Minority Group*

The minority group must also demonstrate that it is "politically cohesive" to pass the *Gingles* threshold inquiry. *Id.* at 51, 106 S.Ct. at 2766. One way of proving political cohesiveness, according to the *Gingles* majority, is to show "that a significant number of minority group members usually vote for the same candidates...." *Id.* at 56, 106 S.Ct. at 2769; see also *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 501-02 (5th Cir.1987), *cert. denied*, 492 U.S. 905, 109 S.Ct. 3213, 106 L.Ed.2d 564 (1989). If the minority group is not politically cohesive, or does not engage in significant bloc voting, "it cannot be said that the selection of a multimember structure thwarts distinctive minority group interests." *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766 (citation omitted).

Although statistical evidence of racially polarized voting, see *infra* Part II.B.1.b., is frequently employed to demonstrate a minority group's political cohesiveness, other

evidence may also establish this second *Gingles* factor. We have on several occasions indicated that *Gingles* allows minority voters to prove their political cohesiveness even in the absence of statistical evidence of racial polarization. See *Westwego III*, 946 F.2d at 1118 n. 12; *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir.1989). In particular, political cohesiveness also may be demonstrated by testimony from persons familiar with the community in question, provided that such testimony is reinforced with other evidence or is not otherwise rebutted. *See Brewer*, 876 F.2d at 453-54; see also *Overton*, 871 F.2d at 536.

Political cohesiveness is related to, but distinct from, the concept of racially polarized voting. The notion of political cohesiveness contemplates that a specified group of voters shares common beliefs, ideals, principles, agendas, concerns, and the like such that they generally unite behind or coalesce around particular candidates and issues. See *Monroe v. City of Woodville*, 881 F.2d 1327, 1331 (5th Cir.1989), modified, 897 F.2d 763, *cert. denied*, 498 U.S. 822, 111 S.Ct. 71, 112 L.Ed.2d 45 (1990). The term racially polarized voting, on the other hand, describes an electorate in which white voters favor and vote for certain candidates or propositions, and minority voters vote for other candidates or propositions. See *Gingles*, 478 U.S. at 53 n. 21, 106 S.Ct. at 2768 n. 21. (racial polarization exists where there is[5] a consistent relationship between the race of the voter and the way in which the voter votes or where minority voters and white voters vote differently). Thus, while a showing of racially polarized voting will frequently demonstrate that minority voters are politically cohesive, a

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[5]Evidence of racially polarized voting does not, however, automatically establish minority political cohesiveness. If, in a certain community, white citizens vote only for candidates of type A, while minority citizens are split in voting for candidates of types X, Y, and Z, then there would be evidence of racially polarized voting—minority and white voters voting differently—but no evidence of minority political cohesiveness.

showing that minority voters are politically cohesive will not, by itself, establish racially polarized voting.

Finally, according to a majority of the Justices in *Gingles*, to satisfy the second threshold factor minority voters need not prove that the reason they vote for the same candidates is linked to race or color. Justice Brennan, writing for three other Justices, would have held that "the reasons [minority] and white voters vote differently have no relevance to the central inquiry of § 2." *Gingles*, 478 U.S. at 63, 106 S.Ct. at 2773 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.). Although not entirely agreeing with Justice Brennan, Justice O'Connor, writing on behalf of three other Justices, agreed that defendants cannot rebut statistical evidence of a minority group's political cohesiveness by "offering evidence that the divergent racial voting patterns may be explained in part by causes other than race." *Gingles*, 478 U.S. at 100, 106 S.Ct. at 2792 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring in the judgment). Justice O'Connor specifically stated that statistical evidence of divergent racial voting offered solely to establish the minority group's political cohesiveness may not be rebutted by evidence indicating that there is "an underlying divergence in the interests of minority and white voters." *Id.*

3. *Legally Significant White Bloc Voting*

Under the third *Gingles* factor, the minority group "must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it— in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766-2767 (internal references omitted). "In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." *Id.* As with demonstrating political cohesiveness, a minority group can demonstrate white bloc voting by introducing statistical evidence of racially polarized voting. See *Westwego III*, 946

F.2d at 1118. Moreover, where statistical evidence of racially polarized voting is used to establish white bloc voting, the elections that will usually be most probative are those in which the minority-preferred candidate is a member of the minority group. See *Westwego I*, 872 F.2d at 1208 n. 7.

The determinative question for this third *Gingles* factor "is not whether whites generally vote as a bloc, but rather, whether such bloc voting is legally significant." *Monroe*, 881 F.2d at 1332. Legally significant white bloc voting means white bloc voting that usually defeats the minority group's preferred candidate. *Id.* at 1333. As the Court recognized in *Gingles*, "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56, 106 S.Ct. at 2769. It is "the usual predictability of the majority's success," the Court continued, that "distinguishes structural dilution from the mere loss of an occasional election." *Id.* at 51, 106 S.Ct. at 2767.

The amount of white bloc voting that rises to the level of legal significance will vary from location to location. That is, in determining whether white voting strength can generally "minimize or cancel" minority voters' ability to elect representatives of their choice, courts must look at a number of factors. *Id.* at 56, 106 S.Ct. at 2769 (quoting S.REP. at 28). Among the factors affecting the level of legally significant white bloc voting are: (1) the nature of the allegedly dilutive electoral mechanism; (2) the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting; (3) the percentage of registered voters in the district who are members of the minority group; (4) the size of the district; and (5) in multimember districts, the number of seats open and the number of candidates in the field. *Gingles*, 478 U.S. at 56, 106 S.Ct. at 2769.

Contrary to the arguments advanced by the State Defendants, Judge Wood, and Judge Entz, a minority group

is not required to demonstrate that racial animus is responsible for a white bloc voting pattern. A requirement of demonstrating racial animus would, in the words of the Senate Report, be "unnecessarily divisive because it [would] involve charges of racism on the part of ... entire communities." S.REP. at 36, 1982 U.S.C.C.A.N. at 214. And, one of the reasons Congress decided to amend Section 2 was to obviate the need for such charges of racism. *Id.*[6]

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[6]Judge Higginbotham contends that five Justices in *Gingles* expressly held that the extent to which voting patterns are attributable to causes other than racial political considerations is an integral part of the racial bloc voting inquiry. Dissenting Op. at [400a-403a]. Indeed, in Judge Higginbotham's view, the failure to demonstrate racial political considerations, or racial animus, in the electorate automatically defeats a vote dilution claim, because the minority group will not be able to demonstrate either legally significant white bloc voting or racially polarized voting. After a careful reading of *Gingles*, we respectfully disagree. We recognize that Justice O'Connor, in her *Gingles* concurrence, disagreed with Justice Brennan's position that explanations of divergent racial voting patterns are "irrelevant" to the Section 2 inquiry. *Gingles*, 478 U.S. at 100, 106 S.Ct. at 2792 (O'Connor, J., joined by three Justices, concurring in the judgment). In expressing her views on the use of statistical evidence to demonstrate racially polarized voting, however, she never "expressly held" that racial political considerations are an "integral part," much less a prerequisite, to a finding of racial bloc voting. Rather, she stated:

> Insofar as statistical evidence of divergent racial patterns is admitted solely to establish that the minority group is politically cohesive *and to assess its prospects for electoral success*, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can *never affect* the *overall vote dilution inquiry*. Evidence that a candidate preferred by the minority group *in a particular election* was rejected by white voters for *reasons other than those which made that candidate the*

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preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will *consistently* defeat minority candidates. Such evidence would suggest that another candidate, *equally preferred by the minority group*, might be able to attract greater white support in *future elections*.

I believe Congress also intended that explanations of the reasons why voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is *polarized along racial lines, racial hostility* may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of the racial groups diverge. Indeed, the Senate Report clearly stated that one factor that could have probative value in § 2 cases was "whether there is a significant *lack of responsiveness* on the part of elected officials to the particularized needs of the members of the minority group. S.Rep., at 29. The *overall vote dilution inquiry* neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on "intensive racial politics," on "racial political considerations," and on whether "racial politics ... dominate the electoral process" as one aspect of "the racial bloc voting" that Congress deemed relevant to showing a § 2 violation. *Id.* at 33-34. Similarly, I agree with Justice White that Justice Brennan's conclusion that the race of the candidate is *always irrelevant* in identifying racially polarized voting conflicts with *Whitcomb* [*v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971)] and is not necessary to the disposition of this case.

478 U.S. at 100-01, 106 S.Ct. at 2792 (emphasis added).

How this passage amounts to, as Judge Higginbotham states, an "express holding" that racial political considerations are an integral part of, or a prerequisite to, a finding of racially polarized voting is not clear. A straightforward reading of this passage, in our view, suggests that Justice O'Connor would consider relevant anecdotal

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testimony indicating that, "in a particular election," white voters rejected a minority-preferred candidate for "reasons other than those which made that candidate the preferred choice of the minority group." Such anecdotal testimony would be relevant, in Justice O'Connor's words, to "suggest that another candidate, equally preferred by the minority group," might be able to attract greater white support in the future. By making this statement, Justice O'Connor recognized that the phenomenon of white bloc voting, as well as racially polarized voting, is only significant if it persists over time. Moreover, she also indicated that "explanations of the reasons why voters rejected minority candidates" would be probative of the totality of circumstances factor relating to the "responsiveness of elected officials." *See infra* Part II.B.1.h. Finally, Justice O'Connor recognizes that in a community "polarized along racial lines," the added circumstance of "racial hostility" may bar even "indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge." Thus, when read in context, Justice O'Connor's *Gingles* opinion is much more consistent with our treatment of racial political considerations, or racial animus in the electorate, as an "other factor" that is relevant to the "*overall vote dilution inquiry*," rather than as a prerequisite to a finding of legally significant white bloc voting. 478 U.S. at 101-02, 106 S.Ct. at 2793 (emphasis added).

Finally, we note that Judge Higginbotham in another portion of his dissent appears to reject the idea that a minority group must demonstrate that racial animus is responsible for a white bloc voting pattern. Judge Higginbotham concedes that it would be unworkable to require plaintiffs to prove the absence of all non-racial causes of voting behavior in order to demonstrate legally significant white bloc voting. However, he clings to the idea that evidence of partisan voting is somehow different from other evidence suggesting the presence or absence of racial political considerations or of racial animus in the electorate. This differentiation between partisanship evidence and other evidence is patently illogical. First, this approach would appear to prevent an inquiry into the many reasons why people vote for the candidates of one party or another. Second, if evidence of partisan voting is sufficient to defeat a finding of white block

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In sum, a minority group can satisfy the third *Gingles* factor by showing that a substantial majority of white voters consistently vote against the candidates preferred by minority voters, such that the candidates preferred by the minority group usually lose. It has never been the case, however, that for white bloc voting to be legally significant, it must be shown to be motivated by racial animus. See e.g., *Westwego III*, 946 F.2d at 1118- 20 (concluding, without inquiring as to the cause of voting patterns, that the record "unmistakably" demonstrated legally significant white bloc voting). We decline to hold so now.

B. The Broader Inquiry: The Totality of the Circumstances

Satisfaction of the *Gingles* factors, at least in this circuit, does not by itself establish a violation of Section 2. See *Westwego III*, 946 F.2d at 1116. The minority group must further demonstrate that, under the totality of the circumstances, "its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Unlike the *Gingles* threshold inquiry, the totality of circumstances inquiry is broad. It requires courts to make a "searching practical evaluation of the 'past and

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voting, why not other evidence suggesting the absence of racial political considerations? If, as Justice O'Connor suggests, the reasons why people vote the way they do are relevant to the overall vote dilution inquiry, how can one stop that inquiry at statistical correlations between the party affiliations of the candidates and electoral success? Indeed, why would such a rule not amount to an "arbitrary rule" against consideration of all evidence concerning voting preferences similar to the rule condemned by Justice O'Connor? Ultimately, Judge Higginbotham's approach would needlessly confuse the narrow *Gingles* factors with the broader inquiry into the totality of the circumstances. The logical solution is to follow the approach mandated by Congress and adopted by Justice O'Connor, i.e., to consider evidence suggesting that divergent voting patterns are not the result of racial political considerations in the totality of circumstances inquiry.

present reality' " of the community and to take a " 'functional' view of the political process." *Gingles*, 478 U.S. at 45, 106 S.Ct. at 2764. Although courts typically should be guided by the factors mentioned in the Senate Report accompanying the 1982 amendments to Section 2, other factors may also be relevant. See *Westwego III*, 946 F.2d at 1120.

1. *The Senate Report Factors*

The Senate Report accompanying the 1982 amendments to Section 2 identifies seven "typical" factors and two "additional" factors that may be relevant to an analysis of the totality of the circumstances. These factors, which were derived from the analytical framework used by the Supreme Court in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), as articulated by this court in *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir.1973), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), are meant to aid a court in assessing whether "the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." S.REP. at 27, 1982 U.S.C.C.A.N. at 205. According to the Senate Report, a court must "assess the impact of the challenged structure or practice on the basis of objective factors, rather than making a determination about the motivations which lay behind its adoption or maintenance." *Id.* at 27, 1982 U.S.C.C.A.N. at 205 (emphasis added).

a. *History of discrimination touching the rights of minorities to participate in the political process.* The first factor mentioned in the Senate Report is "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." S.REP. at 28, 1982 U.S.C.C.A.N. at 206. In listing this factor, Congress made clear that it "was concerned not only with present discrimination, but with the vestiges of discrimination which may interact with present

political structures to perpetuate a historical lack of access to the political system." *Westwego I*, 872 F.2d at 1211-12. Evidence that is relevant under this factor includes the use of poll taxes and literacy tests, as well as the existence of racially segregated schools and public facilities. See *White*, 412 U.S. at 768, 93 S.Ct. at 2340; *Zimmer*, 485 F.2d at 1306; see also Andrew P. Miller and Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What is the Intent of the Results Test?*, 36 EMORY L.J. 1, 28 (1987).

b. *Extent of racially polarized voting.* The second factor that Congress deemed relevant to an analysis of the totality of the circumstances is "the extent to which voting in the elections of the state or political subdivision is racially polarized." S.REP. at 29, 1982 U.S.C.C.A.N. at 206. This factor is one of the two most important in the inquiry into the past and present reality of the challenged electoral structure. *Westwego III*, 946 F.2d at 1120. It is, we have stated, "the linchpin of a s 2 vote dilution claim...." *Gretna*, 834 F.2d at 499; see also Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH.L.REV. 1833, 1848-49 (1990) (opining that the inclusion of the racially polarized voting inquiry in the Senate Report marked "a major shift in voting rights law" and pointed to an "emerging doctrinal coherence for claims of minority vote dilution").

As previously discussed, see *supra* Part II.A.2, racially polarized voting "exists where there is a 'consistent relationship between [the] race of the voter and the way in which the voter votes,' ... or to put it differently, where '[minority] voters and white voters vote differently.' " *Gingles*, 478 U.S. at 53 n. 21, 106 S.Ct. at 2768 n. 21. Racially polarized voting is not, as Judge Wood, Judge Entz, and the State Defendants suggest, racially motivated voting,

or voting caused by racial animus.[7] *See Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir.1987) ("The legal standard for the existence of racially polarized voting looks only to the difference between how majority votes and minority votes were cast; it does not ask why those votes were cast the way they were...."). Nor is racially polarized voting simply "the tendency of citizens to vote for candidates of their own race." Miller & Packman, *supra*, at 16. Rather, racially polarized voting is an objective factor, which is established by evidence demonstrating that "voters vote along racial lines." *Westwego III*, 946 F.2d at 1122.

To say that racial polarization does not simply measure

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[7]Although the ultimate inquiry in a Section 2 case is whether minority voters have an unequal opportunity to participate in the political process on account of race or color, see *infra* Part II.C., we decline to redefine the concept of racially polarized voting to include a causation element. To establish racially polarized voting, a minority group need not prove that divergent racial voting patterns are motivated or caused by racial animus in the electorate. Moreover, we decline to hold that a multivariate analysis—i.e., an analysis that investigates more variables than the race of the voters—is necessary to show racially polarized voting. In our view, such a definition would be inconsistent with Congress' intent in amending Section 2 and directing courts to "assess the impact of the challenged structure or practice on the basis of objective factors, rather than making a determination about the motivations which lay behind its adoption or maintenance." S.REP. at 27, 1982 U.S.C.C.A.N. at 205 (emphasis added). See generally, Richard L. Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 How.L.J. 495, 498 (1985) (disapproving the recent trend in federal courts to give a "second life" to the intent requirement); cf. *Kirksey v. City of Jackson*, 663 F.2d 659, 662 (5th Cir. Unit A Dec.1981) (holding that, because of First Amendment concerns, the motivations of voters are not subject to searching scrutiny by plaintiffs in a voting rights case), clarified, 669 F.2d 316 (1982). In refusing to redefine the concept of racially polarized voting, however, we do not mean to say that evidence of the presence or absence of racial animus in the electorate is irrelevant to the totality of circumstances inquiry. See *infra* Part II.B.2.

the tendency of citizens to vote for candidates of their own race, however, does not mean that evidence of such tendencies are unimportant to the racial polarization inquiry. We recognized in *Gretna* that, in determining the existence of racial bloc voting, "the race of the candidate is in general of less significance than the race of the voter—but only within the context of an election that offers voters the choice of supporting a viable minority candidate." 834 F.2d at 503. Furthermore, we have noted that "the evidence most probative of racially polarized voting must be drawn from elections including both [minority] and white candidates." *Westwego I*, 872 F.2d at 1208 n. 7.[8] Accordingly, in ascertaining whether a community's elections are characterized by racially polarized voting, a court may properly give more weight to elections in which the minority-preferred candidate is a member of the minority group.

The Senate Report recognizes that racially polarized voting is a relative concept by instructing courts to assess not only the existence of racially polarized voting, but the extent of such voting. Indeed, the existence of racially polarized voting will frequently, if not always, be established by satisfying of the second and third *Gingles* factors. See *supra* Parts II.A.2., II.A.3; see also *Romero v. City of Pomona*, 883 F.2d 1418, 1423 (9th Cir.1989) (suggesting that the second and third *Gingles* factors, political cohesiveness and white bloc voting, are the "component parts" of racially polarized

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[8]In his dissent, Judge Higginbotham, citing our opinion in *Gretna*, suggests that the reason elections with a minority candidate are most probative of racially polarized voting is because we are trying to determine whether such voting is caused by racial animus in the electorate. See Dissenting Op. at [402a-403a]. We disagree. Our decision in *Gretna* indicates that the reason for focusing on these elections is— generally—to ensure that we are considering elections "that offer [ ] voters the choice of supporting a viable minority candidate," 834 F.2d at 503, or more specifically, a minority candidate that is preferred by the minority group.

voting). Under the totality of circumstances inquiry, the focus is on the degree of racially polarized voting. When the pattern of racially polarized voting is severe—that is, when minority and white voters rarely engage in cross-over voting—an at-large election scheme is more likely to dilute minority voting strength in violation of Section 2. Conversely, when the pattern of racially polarized voting is slight, and there is substantial cross-over voting between minority and with voters, an at-large election scheme is less likely to dilute minority voting strength in violation of Section 2.

c. *Use of voting practices that enhance the opportunity for discrimination*. The Senate Report also directs courts to consider other voting practices that may interact with the challenged election scheme to dilute minority voting strength. In particular, courts are to consider "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group." S.REP. at 29, 1982 U.S.C.C.A.N. at 206. Courts may also consider, at least in the context of at-large elections, whether the state or political subdivision employs what amounts to a numbered-post system and whether the system lacks a district residency requirement. See *White v. Regester*, 412 U.S. 755, 766, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314 (1973) (discussing Texas' "place" rule). The potential of such features to dilute minority voting strength is well-documented. See *generally* Chandler Davidson, *Overview*, in MINORITY VOTE DILUTION 5-8 (Chandler Davidson ed. 1984).

Unusually large election districts may enhance vote dilution in a least two ways: First, such districts may make it more difficult for minorities to successfully campaign for office. See *Rogers v. Lodge*, 458 U.S. 613, 627, 102 S.Ct. 3272, 3280, 73 L.Ed.2d 1012 (1982); see also *Whitcomb v. Chavis*, 403 U.S. 124, 143, 91 S.Ct. 1858, 1869, 29 L.Ed.2d

363 (1971) (recognizing that, when large, multimember districts have an enhanced tendency to minimize or cancel out minority voting strength). Such districts may also create the problem of overly long ballots, making "an intelligent choice among candidates ... quite difficult." *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 731, 84 S.Ct. 1459, 1471, 12 L.Ed.2d 632 (1964).

The other features discussed above similarly enhance the possibility of vote dilution. Majority vote requirements can obstruct the election of minority candidates by giving white voting majorities a "second shot" at minority candidates who have only mustered a plurality of the votes in the first election. *See Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 491 (1975) (testimony of Dr. Charles Cotrell); *see also Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir.1984); *Major v. Treen*, 574 F.Supp. 325, 351 n. 32 (E.D.La.1983) (three-judge court). Anti-single shot provisions prohibit voters from casting fewer than all of their votes and effectively force minority voters to cast votes for white candidates who may not be favored by minority voters. *Westwego III*, 946 F.2d at 1113 n. 3. Under a numbered post system, candidates are required to run for a designated seat. See *White*, 412 U.S. at 766, 93 S.Ct. at 2339. This requirement, the Supreme Court has recognized, "enhances [the minority group's] lack of access because it prevents a cohesive political group from concentrating on a single candidate." *Rogers*, 458 U.S. at 627, 102 S.Ct. at 3280. Finally, where there is no requirement that candidates reside in subdistricts of a multimember district, "all candidates may be selected from outside [a minority group's] residential area." *White*, 412 U.S. at 766 n. 10, 93 S.Ct. at 2340 n. 10.

d. *Minority access to the slating process.* The fourth totality factor listed in the Senate Report is "whether members of the minority group have been denied access" to any candidate slating process. S.REP. at 29, 1982 U.S.C.C.A.N. at 206. Slating has been defined as "the creation of a package or slate of candidates, before filing for

office, by an organization with sufficient strength to make the election merely a stamp of approval of the pre- ordained candidate group." *Overton*, 871 F.2d at 534. The core inquiry as to slating, we have stated, "is the ability of [minorities] to get on the ballot." *Hendrix v. Joseph*, 559 F.2d 1265, 1268 (5th Cir.1977).

Where a slating organization exists, "the ability of minorities to participate in that slating organization and to receive its endorsement may be of paramount importance." *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1569 (11th Cir.) (Wisdom, J., sitting by designation), *cert. denied*, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984). We have indicated, however, that a slating organization's endorsement of a few minority candidates will not preclude a finding that the minority group lacks access to the slating process, at least where those candidates are not preferred by the minority group. See *Velasquez v. City of Abilene*, 725 F.2d 1017, 1022 & n. 1 (5th Cir.1984) (referring to the Senate Report). Moreover, we have recognized that the absence of a slating organization will not mitigate evidence of an unequal opportunity to participate in the political process. See *McMillan v. Escambia County*, 638 F.2d 1239, 1245 (5th Cir.), *cert. dismissed*, 453 U.S. 946, 102 S.Ct. 17, 69 L.Ed.2d 1033 (1981).

e. *Lingering socioeconomic effects of discrimination.* Congress also has directed courts to consider "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health...." S.REP. at 29, 1982 U.S.C.C.A.N. at 206. In doing so, Congress recognized that the lingering socioeconomic effects of discrimination may hinder a minority group's "ability to participate effectively in the political process." *Id.* Where the minority group presents evidence that its members are socioeconomically disadvantaged and that their level of participation in politics is depressed, the group "need not prove any further causal nexus between [its members'] disparate socioeconomic status and the depressed level of political participation." *Id.* at 29

n. 114, 1982 U.S.C.C.A.N. at 207 n. 114.

f. *Use of racial appeals in campaigns.* The Senate Report further directs courts, when looking at the present reality of the community's political process, to consider "whether political campaigns have been characterized by overt or subtle racial appeals." S.REP. at 29, 1982 U.S.C.C.A.N. at 206. The presence of this factor, Congress undoubtedly recognized, could provide evidence that racial politics dominate the political process. See *Id.* at 33, 1982 U.S.C.C.A.N. at 210-211. The absence of racial appeals, however, is not fatal to a minority group's vote dilution claim under Section 2. As Judge Wisdom recognized in *Marengo County*, overt political racism has decreased over time. 731 F.2d at 1571. Therefore, while "[e]vidence of racism can be very significant if it is present[,].... its absence should not weigh heavily against a plaintiff proceeding under the results test of [S]ection 2." *Id.*

g. *Extent to which minority candidates have been elected to public office.* The "extent to which members of the minority group have been elected to public office in the jurisdiction," S.REP. at 29, 1982 U.S.C.C.A.N. at 207, along with the extent of racially polarized voting, are the two most important factors that the district court must consider its analysis of the totality of the circumstances. See *Gingles*, 478 U.S. at 48 n. 15, 106 S.Ct. at 2767 n. 15; *Westwego III*, 946 F.2d at 1120. Indeed, minority candidate success is the only factor that is mentioned in the language of Section 2 itself.[9] Subsection (b), which sets forth the totality of the

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[9]Judge Higginbotham suggests that, because Congress explicitly mentioned the extent to which minorities have been elected as a totality of circumstances factor in the statute itself, it should somehow take precedence over the extent to which minorities have been able to elect candidates "of their choice." Judge Higginbotham suggests that "it is quite possible" that minority plaintiffs will not be able to demonstrate a lack of electoral success," an element that is crucial to their claim, "where black Republicans win and white Democrats lose."

(continued...)

circumstances standard, expressly provides: "The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. s 1973(b).

In the Senate Report, Congress indicated that the analysis of minority candidate success should be a cautious, relative inquiry. On the one hand, Congress recognized that, where "no members of a minority group have been elected to office over an extended period of time," the lack of success "is probative." S.REP. at 29 n. 115, 1982 U.S.C.C.A.N. at 207 n. 115. Congress cautioned, however, against giving too much weight to the isolated instances of minority candidate success. Citing our decision in *Zimmer*, Congress noted that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the [minority] vote' in violation of this section." S.REP. at 29 n. 115, 1982 U.S.C.C.A.N. at 207 n. 115. If such isolated successes were allowed to foreclose a Section 2 claim, Congress continued, "the possibility exists that the majority citizens might evade the section[, for example,] by

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[9](...continued)
Dissenting Op. at [391a]. Judge Higginbotham further states that the Senate Report precludes courts from considering—through a filter—whether particular minorities who have won elections have been the minority-preferred candidate. Dissenting Op. at [393a]. We disagree. The Senate Report directs courts to consider the "totality of the circumstances," and where a minority candidate is elected with virtually no support from the minority community, a court may reasonably take that fact into account in resolving the ultimate question under Section 2 of whether minorities have an equal opportunity to elect "representatives of their choice." 42 U.S.C. s 1973(b).

manipulating the election of a 'safe' minority candidate." *Id.*[10]

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[10]In his dissent, Judge Higginbotham recognizes that "[e]vidence of the electoral success of minority candidates should not, of course, be accepted uncritically." Dissenting Op. at [393a]. He then asks us, however, to hold that where "several" Republican minority candidates have been elected—as opposed to a "few"—such successes must be accepted uncritically as evidence that white voters are not motivated by racial animus. Dissenting Op. at [394a]. We think such a distinction would be unwise and inconsistent with Supreme Court precedent. First, it is not clear, and Judge Higginbotham does not tell us, what the difference is between a "few" and "several" Republican minority candidates. Moreover, he does not even set forth the number of minority Republican district court candidates that were elected in the eight years studied by the experts in this case, and for good reason. Our review of the record leaves us uncertain about that number. As best we can tell from the record, from 1980 to 1988 it appears that: (1) in Harris County, one Black Republican district court candidate won a contested general election; (2) in Dallas County, two Black Republican district court candidates won contested general elections; (3) in Bexar County, one Hispanic Republican won a contested general election; and (4) in Tarrant County, one Black Republican won a contested general election. Based on our review of the record, we can only surmise that Judge Higginbotham reaches the conclusion that "several" minority Republican candidates have been elected by aggregating elections from the various counties. This case should not turn on whether the election of five minority Republican district court judges qualifies as "several" or "few." Besides, such aggregation is contrary to *Gingles*, which in this case requires that vote dilution inquiries be county-specific. And, focusing on the county-by-county analysis mandated by *Gingles*, we think it would be splitting hairs to hold that the election of two Black Republican district judges in Dallas County precludes a successful vote dilution claim—whereas the election of one such judge would not foreclose a claim. Finally, while all members of the Court in *Gingles* agreed that consistent and virtually proportional minority candidate success would foreclose a Section 2 claim, see 478 U.S. at 77, 104-05, 106 S.Ct. at 2780, 2794, "proportional" success by minority candidates is a far cry from the success of "several" minority Republican candidates. At bottom, Judge Higginbotham urges that the election

(continued...)

Congress did not, however, clearly establish a reference point for measuring the success of minority candidates. One possibility is to measure the success of minority candidates by reference to the proportion of minorities in the local population. Another way in which to measure the success of minority candidates is to focus on their success rate by comparing the number of minority candidates who have won with the number of minority candidates who have lost. And finally, as a third way of gauging minority success, a court could compare the number of minorities elected with the "qualified applicant pool," as is currently done with employment discrimination claims brought under Title VII of the Civil Rights Act of 1964.

In our view, both of the first two methods discussed above are relevant to the inquiry of minority candidate success. Measuring the success of minority candidates by referring to the proportion of minorities in the local population is supported by the language of Section 2. See 42 U.S.C. § 1973(b). The method was also embraced by a majority of the Justices in *Gingles*. See *Gingles*, 478 U.S. at 77, 106 S.Ct. at 2780 (Brennan J., joined by White, J.) (finding that "persistent proportional representation" of minority voters in a multimember district precluded their vote dilution claim); *Id.* at 104- 05, 106 S.Ct. at 2794 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring in the judgment) (stating that "consistent and virtually proportional minority electoral success" is entitled to great weight in totality of circumstances analysis). The Senate Report provides support for relying on the success rate of minority candidates in determining the extent to

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[10](...continued)
of "several" (perhaps five in the nine counties at issue here) Republican minority candidates, candidates who were not even supported by the minority community, indicates as a matter of law that minorities have an equal opportunity to elect representatives of their choice. This result is simply contrary to the plain language of Section 2.

which minorities have been elected. It specifically notes the probative value of "[t]he fact that no members of a minority group have been elected to office over an extended period of time...." S.REP. at 29 n. 115, 1982 U.S.C.C.A.N. at 207 n. 115 (emphasis added).

We have serious reservations about the relevance of the third, "qualified applicant pool" approach. Such an approach seems inconsistent with our "refusal to preclude vote dilution claims where few or no [minority] candidates have sought offices in the challenged electoral system." *Westwego I*, 872 F.2d at 1209 n. 9. It would, in our view, "allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove." *Id.* Indeed, it seems perverse to measure the success of minority candidates by referring to the pool of qualified minority candidates, when the paucity of qualified minority candidates "is a likely result of a racially discriminatory system." *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (11th Cir.1984). But see *Southern Christian Leadership Conference of Alabama v. Evans*, 785 F.Supp. 1469, 1476-77 (M.D.Ala.1992) (measuring success of minority candidates under "qualified applicant pool" standard).

h. *Responsiveness of elected officials to particular needs of the minority group.* An "additional factor" that in some cases has probative value in the totality of circumstances inquiry is "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S.REP. at 29, 1982 U.S.C.C.A.N. at 207. The Senate Report makes clear, however, that "[u]nresponsiveness is not an essential part" of a vote dilution claim. *Id.* at 29 n. 116, 1982 U.S.C.C.A.N. at 207 n. 116. "Therefore, defendants' proof of some responsiveness [does] not negate [a minority group's] showing by other, more objective factors ... that minority voters nevertheless [are] shut out of equal access to the political process." *Id.*; see *Campos v. City of Baytown*, 840 F.2d 1240, 1250 (5th Cir.1988).

i. *Tenuousness of the policy underlying the challenged*

practice. A second "additional factor" that is sometimes relevant to totality of circumstances analysis is "whether the policy underlying the state or political subdivision's use of [the challenged] voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." S.REP. at 29, 1982 U.S.C.C.A.N. at 207. The tenuousness of the policy underlying the challenged practice, although less important under the "results test" embodied in Section 2, is nonetheless relevant. See *Marengo County*, 731 F.2d at 1571. Evidence of a tenuous underlying state policy, which is circumstantial evidence that the practice or procedure was motivated by an intent to discriminate, may also indicate that the practice or procedure produces a discriminatory result. See *id.* Moreover, "the tenuousness of the justification for a state policy may indicate that the policy is unfair." *Id.* (citation omitted); see also S.REP. at 29 n. 117, 1982 U.S.C.C.A.N. at 207 n. 117 ("If the [challenged] procedure markedly departs from past practice or from practice elsewhere in the jurisdiction, that bears on the fairness of its impact."). The existence of a legitimate state policy underlying the challenged practice or procedure does not, however, preclude a finding of vote dilution. As noted in the Senate Report: "[E]ven a consistently applied practice premised on a racially neutral policy [does] not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S.REP. at 29 n. 117, 1982 U.S.C.C.A.N. at 207 n. 117.

2. *Other Relevant Factors, Including Racial Animus in the Electorate*

The list of relevant factors in the Senate Report is not exclusive. The Senate Report specifically states that, while the nine "enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution." S.REP. at 29, 1982 U.S.C.C.A.N. at 207. The report also instructs courts to consider "the challenged election law or procedure, in the context of the total circumstances of the local electoral process." See *id.* at 16, 1982 U.S.C.C.A.N. at 193 (emphasis added). As we stated

in *Westwego III*, "other factors may be relevant" under the totality of circumstances inquiry. 946 F.2d at 1120.

In determining whether a factor not expressly mentioned in the Senate Report is relevant for purposes of the totality of circumstances inquiry, courts should be mindful of Justice O'Connor's admonition in *Gingles* to avoid arbitrary rules that prevent "consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns." 478 U.S. at 101, 106 S.Ct. at 2792 (O'Connor, J., concurring). Courts should also remember that the totality of circumstances inquiry is expansive and requires a "searching practical evaluation of the 'past and present reality.' " S.REP. at 30, 1982 U.S.C.C.A.N. at 208 (quoting *White v. Regester*) (emphasis added). Finally, courts should determine whether the particular factor being advanced as relevant under the totality of circumstances inquiry is probative of the ultimate vote dilution inquiry. See *infra* Part II.C.

The State Defendants, Judge Wood, and Judge Entz argue that, under these principles, the presence or absence of racial animus in the electorate must be relevant to the totality of circumstances inquiry. We agree and accordingly hold that racial animus in the electorate is an "other factor" that is relevant to the totality of circumstances inquiry. After all, as Justice O'Connor recognized in her *Gingles* concurrence, the Senate Report accompanying the amendment to Section 2 repeatedly emphasizes the relevance of "racial politics" and "racial political considerations" to the vote dilution inquiry. See *Gingles*, 478 U.S. at 101, 106 S.Ct. at 2792 (O'Connor, J., concurring) (citing S.REP. at 33-34, 1982 U.S.C.C.A.N. at 210-212). Moreover, by listing the presence of racial campaign appeals as a relevant factor in the totality of circumstances inquiry, Congress has already instructed courts to consider, at least in a limited fashion, whether racial politics are a part of the local political landscape.

The presence of racial animus in the electorate may be a signal of vote dilution. Indeed, like the presence of racial

campaign appeals, racial animus in the electorate "can be very significant if it is present." *Marengo*, 731 F.2d at 1571. Where white voters are motivated by racial animus, minority voters are not only likely to be prevented from electing representatives of their choice, but they are also likely to be unable to influence the representatives who are elected. See *Gingles*, 478 U.S. at 100-01, 106 S.Ct. at 2792 (O'Connor, J., concurring). In addition, the presence of racial animus in the electorate makes it substantially more likely that an election practice with the potential to dilute minority voting strength is in fact operating to dilute minority voting strength.

The absence of racial animus in the electorate, however, like the absence of racial campaign appeals, "should not weigh heavily against a plaintiff proceeding under the results test of [S]ection 2." *Marengo*, 731 F.2d at 1571. The limited relevance of the absence of racial animus is mandated by two considerations. The first is the nature of racial animus as a subjective rather than an objective factor pointing toward vote dilution. In the Senate Report accompanying the amended Section 2, Congress expressed a preference for objective rather than subjective indicators of vote dilution. *See, e.g.*, S.REP. at 27, 1982 U.S.C.C.A.N. at 204. Placing great weight on the absence of racial animus in the electorate would, in our view, be contrary to congressional intent. The second consideration mandating that little weight be accorded to the absence of this factor is the problem of proving the existence of racial animus in the electorate. As Judge Wisdom has recognized, because overt political racism has decreased over time, racial animus in the electorate may be difficult, if not impossible, to detect. *See Marengo*, 731 F.2d at 1571. Anecdotal testimony to the effect that voters are pure of heart, by its very nature, will not bear much weight. Moreover, as the experts in this case admitted, see *infra* Part IV.B.3.a.(iii), there are inordinate difficulties in using statistical analyses to explain why voters vote for or against certain candidates. One expert, on whom the State Defendants placed heavy reliance, testified that it

would be impossible to use a multivariate analysis to account for the various factors that might influence voters' decisions. See *id.*

Thus, racial animus in the electorate, like other factors in the totality of circumstances inquiry, is neither necessary nor dispositive. We reiterate that a plaintiff proceeding under Section 2 need not establish racial animus in the electorate to demonstrate minority political cohesiveness, legally significant white bloc voting, or racially polarized voting. Moreover, because racial animus in the electorate is not an essential element of a vote dilution claim, evidence suggesting the absence of racial animus cannot, by itself, defeat a vote dilution claim.[11]

C. The Ultimate Inquiry: Unequal Opportunity to Participate on Account of Race or Color

In the end, the *Gingles* threshold inquiry and the expansive, totality of circumstances inquiry provide only guidance for answering the ultimate Section 2 inquiry: whether it has been shown "that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial or language minority] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. s 1973(b). As the Senate Report accompanying the amended Section 2 cautions, courts should not become bogged down in "mechanical 'point counting.' " S.REP. at 29 n. 118, 1982 U.S.C.C.A.N. at 207 n. 118. No one of the factors is dispositive, and the minority group need not prove a majority of the factors mentioned in the Senate Report.

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[11] Judge Higginbotham would hold that evidence merely suggesting the absence of specific racial animus in the electorate—namely, evidence that "several" minority Republicans have won elections—by itself defeats a vote dilution claim. For the reasons we have already stated, see *supra* notes 6 and 10, we reject this argument as being inconsistent with *Gingles* and congressional intent.

Westwego III, 946 F.2d at 1120. Rather, based on "the totality of circumstances and guided by those relevant factors in the particular case," a court is required to make an overall judgment of "whether the voting strength of minority voters is ... 'minimized or canceled out.' " S.REP. at 29 n. 118, 1982 U.S.C.C.A.N. at 207 n. 118; see also *Gingles*, 478 U.S. at 47, 106 S.Ct. at 2764 ("The essence of a s 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives.").

The focus of the ultimate Section 2 inquiry is on minority voters' unequal opportunity to participate in the electoral process on account of race or color. The factors that must be considered in both the *Gingles* and the totality of circumstances inquiries point to minority voters' unequal opportunity to participate in the political process. Those factors also point to an unequal opportunity to participate on the basis of race or color. That is, to prevail under Section 2, a minority group has the burden to demonstrate (1) that, because of the challenged scheme or practice, its members are unable to fully participate in the political process and (2) that their inability to participate is tied to race or color. The framework set forth by the Supreme Court in *Gingles* and by Congress in the Senate Report is the only means through which a minority group meets this burden.

By framing the ultimate vote dilution inquiry in terms of whether the minority group has demonstrated an unequal opportunity to participate in the political process that is tied to race or color, we give effect to Congress' intent in amending Section 2. The language of Section 2, as well as the Senate Report accompanying the amendment of that section, indicate that Congress was concerned with minority groups having an unequal opportunity to participate in the political process. See 42 U.S.C. § 1973(b) (violation established if minority group has "less opportunity" to participate in the political process under the totality of

circumstances); S.REP. at 27, 1982 U.S.C.C.A.N. at 205 (violation established if minority group demonstrates under totality of circumstances that, because of the challenged practice, its members are being "denied equal access to the political process"); S.REP. at 30, 1982 U.S.C.C.A.N. at 207 (ultimate question is whether the political processes are "equally open" to minority candidates). The language of Section 2 also indicates that Congress was concerned with voting practices resulting in an unequal opportunity to participate that is linked to race or color. By prohibiting only election procedures that result "in a denial or abridgment of the right ... to vote on account of race or color...." 42 U.S.C. § 1973(a) (emphasis added), Congress expressed its intent that the minority group's unequal opportunity be tied to race or color. See also *Chisom v. Roemer*, ___ U.S. ___, ___, 111 S.Ct. 2354, 2363, 115 L.Ed.2d 348 (1991) ("Now plaintiffs can prevail under § 2 by demonstrating that a challenged election practice has resulted in the denial or abridgement of the right to vote based on color or race.") (emphasis added).

To show that an at-large election scheme results in an unequal opportunity to participate in the political process on account of race or color, however, a minority group need not demonstrate current racial animus in the electorate. See S.REP. at 28 n. 109, 1982 U.S.C.C.A.N. at 205 n. 109 ("[I]t is patently clear that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination."). Rather, the minority group may, by demonstrating some mix of factors under the totality of the circumstances—such as the existence of racially polarized voting, racial campaign appeals, a history of official discrimination, the lingering socioeconomic effects of discrimination, and other features of the current or past racial climate—raise an inference that their unequal opportunity to participate is linked to race or color. In short, members of a minority group seeking relief may satisfy the ultimate vote dilution inquiry by offering circumstantial

evidence that racial discrimination is responsible for their unequal opportunity to participate in the political process.

III. THE PROPOSED BALANCING FRAMEWORK FOR ANALYZING SECTION 2 VOTE DILUTION CLAIMS

The State Defendants, as well as Judge Wood and Judge Entz, argue that the analytical framework set forth in Part II of this opinion is incomplete. Specifically, they argue that the *Gingles* inquiry, the totality of circumstances inquiry, and the ultimate vote dilution inquiry fail to adequately take into account Texas' asserted interests in maintaining its current method of electing district court judges. Thus, they propose a balancing framework for analyzing Section 2 vote dilution claims—a framework in which a court would be required to weigh the extent of proven vote dilution, as established by the factors set forth in Part II of this opinion, against the magnitude of the state's asserted interests in the election scheme or practice.

A. The Accepted Role of State Interests in Section 2 Analysis

All parties concede that the state interests underlying an allegedly dilutive election practice are relevant to Section 2 analysis in two ways. First, as discussed above, see *supra* Part II.B.1.i., a state's interests in the challenged election practice may be relevant in the totality of circumstances inquiry. The district court may consider as an "additional factor" whether the state policies underlying the challenged practice are tenuous. See S.REP. at 29, 1982 U.S.C.C.A.N. at 206. Second, a state's interests in the challenged practice must be taken into account during the remedial phase of a vote dilution lawsuit. In *Whitcomb v. Chavis*, 403 U.S. 124, 160-61, 91 S.Ct. 1858, 1878, 29 L.Ed.2d 363 (1971), the Supreme Court held that the district court may not "broadly brush[ ] aside state apportionment policy" when remedying an allegedly dilutive electoral mechanism. Instead, when choosing among remedial plans or fashioning one of its own, the district court must honor state policies and intrude on

those policies only to the extent necessary. See *Upham v. Seamon*, 456 U.S. 37, 40-42, 102 S.Ct. 1518, 1520- 1521, 71 L.Ed.2d 725 (1982); *White v. Weiser*, 412 U.S. 783, 795, 93 S.Ct. 2348, 2355, 37 L.Ed.2d 335 (1973); see also *United States v. Dallas County Comm'n*, 850 F.2d 1430, 1432 (11th Cir.1988) ("[W]hen devising election plans, federal courts should defer to state legislative policy and modify the state's plan only to the extent necessary to cure statutory or constitutional defects."), *cert. denied*, 490 U.S. 1030, 109 S.Ct. 1768, 104 L.Ed.2d 203 (1989).

B. The Proposed Role for State Interests in Section 2 Analysis

The State Defendants, Judge Wood, and Judge Entz propose a new role for state interests in Section 2 analysis. Although the details for their proposals are different, all the proposals have one thing in common. Under each of the proposals, state interests in an underlying election scheme would have to be weighed against proven vote dilution before a Section 2 violation could be found.

Judge Wood proposes a three-step balancing framework. Under her framework a court would first be required, "[i]n each vote dilution case, [to] separately determine the existence and severity of vote dilution." Judge Wood's Brief on Remand at 29. The court would then be required to separately "assess the state interests that would be affected." *Id.* Finally, the court would have to "balance the severity of the dilution against the intrusion on state interests necessary to cure it to determine if a remediable violation of § 2 exists under the totality of the circumstances." *Id.* If the state interests outweighed the severity of the dilution, then there would be no violation of Section 2.

The balancing framework proposed by Judge Entz is somewhat more complex. Under his proposed framework, the minority group would first have to satisfy the *Gingles* threshold inquiry. Once the minority group did so, the court would then have to consider whether the state interests are legally compelling—that is, (1) whether they relate to a central aspect of state sovereignty, and (2) whether

tampering with them would result in undue federal entanglement with the operations of state government. If the state interests were compelling, they would "prevent a section 2 violation." Judge Entz's Brief on Remand at 9. If the state interests were not legally compelling, the district court would still be required to weigh the state interests in the challenged practice, "along with all other factors ... to determine whether the [minority group] proved dilution by clear and convincing evidence." *Id.*

Although similar to the framework proposed by Judge Entz, the framework proposed by the State Defendants is yet a third version of the balancing framework. Under this proposal, the district court would first, before inquiring into any alleged vote dilution, ascertain whether the challenged election procedure is necessary to achieve a compelling state interest. If this Fourteenth Amendment strict scrutiny standard were satisfied, the State Defendants argue, the state interest would be "sufficiently strong to outweigh as a matter of law the other elements in the totality of the circumstances...." State Defendants' Brief on Remand at 21. If the strict scrutiny standard were not satisfied, then, under the State Defendants' proposal, the district court would still be required to engage in some kind of weighing: The plaintiffs would have to set forth facts to satisfy the *Gingles* inquiry. The burden would then "shift to the state to produce evidence of its interests in the maintenance of the system and the non- discriminatory reasons for retaining the system." *Id.* at 24. And finally, if the state met its shifting burden, the plaintiffs would have to prove their vote dilution case by clear and convincing evidence. *Id.* at 24-25.

C. Problems with the Proposed Balancing Framework

In evaluating the appropriateness of balancing state interests against proven vote dilution under Section 2 analysis, we discover two problems. The first problem is that the proposed balancing framework may not be grounded in law. The second is that the proposed balancing framework appears to unnecessarily complicate an already complex analysis. Although both of these problems call into question

the appropriateness of the proposed balancing framework, we ultimately need not decide whether such a framework is required in this case.

1. *The Legal Problem*

The proposed balancing framework may be grounded in law in one of several ways. First, in amending Section 2 and providing for a totality of circumstances analysis, Congress may have expressly intended for courts to balance the "total circumstances" pointing toward vote dilution against the state's asserted interests in the challenged election practice. Second, even if Congress did not expressly intend to provide for a balancing framework, constitutionally-rooted federalism principles may nonetheless require such a framework. Or finally, the Supreme Court may have erected a balancing framework when it remanded this case to us in *Houston Lawyers' Association v. Attorney General of Texas*, ___ U.S. ___, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991).

a. *Congressional intent.* Before addressing any constitutional concerns, we first ask whether Congress demonstrably intended for state interests to be balanced against proven vote dilution before finding a violation of Section 2. If Congress expressed an intent that courts should use a balancing framework in analyzing vote dilution claims, we are undoubtedly bound by that intent. Of course, in discerning congressional intent, we apply the traditional tools of statutory construction, looking first to the language of Section 2 and then to the legislative history if the language of the statute is ambiguous. See *Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984).

Our inquiry necessarily begins with the language of Section 2. On its face, Section 2 does not allow a state to defeat proof of vote dilution by showing that it has a good reason for maintaining the challenged electoral practice. It provides, in absolute terms, that a violation is established if, "based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to

participation by members [of a racial or language minority]...." 42 U.S.C. § 1973(b). It makes no exceptions.

The Senate Report accompanying the amendment of Section 2 speaks in similarly absolute terms. The report states: "If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this section." S.REP. at 28, 1982 U.S.C.C.A.N. at 206 (emphasis added). It does not make an exception for election practices or structures that are justified by strong or compelling state interests. And, although the Senate Report allows courts to consider whether the state interests underlying the challenged procedure are tenuous, this consideration is qualitatively different from balancing state interests against proven vote dilution. Moreover, Congress emphasized that "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." *Id.* at 29 n. 117, 1982 U.S.C.C.A.N. at 207 n. 117. Thus, the Senate Report, like the language of Section 2 itself, appears inconsistent with the balancing framework proposed in this case.

b. *Federalism principles.* The State Defendants, Judge Wood, and Judge Entz argue that, even if Congress did not expressly intend for courts to employ a balancing framework under Section 2, federalism principles nonetheless require us to construe Section 2 to allow for such an approach. Relying primarily on the Supreme Court's decision in *Gregory v. Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), they argue that we should employ a plain statement rule of statutory construction. In particular, they argue that we should construe Section 2 to require a balancing framework unless Congress has unmistakably indicated its intent to upset the usual constitutional balance of federal and state powers.

In *Gregory*, the Supreme Court granted certiorari to decide whether the mandatory retirement provision for state

judges in the Missouri Constitution violated the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634. See ___ U.S. at ___, 111 S.Ct. at 2398. The ADEA prohibits any employer, including state employers, from discharging an employee who is at least 40 years old because of such individual's age. 29 U.S.C. § 630(b)(2). The definition of "employee" under the ADEA, however, excludes all elected and most high-ranking government officials. See 29 U.S.C. § 630(f). The crucial question in Gregory thus became whether state judges, who are appointed by the Governor of Missouri and thereafter subject to retention elections, were "employees" within the meaning of the ADEA. ___ U.S. ___, 111 S.Ct. at 2403.

In order to avoid potential constitutional problems, the Court in Gregory applied a "plain statement" rule of statutory construction, requiring Congress to unmistakably express its intention to alter the usual constitutional balance between the states and the federal government. Because Congress did not plainly express its intent to include appointed state judges within the terms of the ADEA, the Court held that such judges were not covered. ___ U.S. at ___, 111 S.Ct. at 2404. The Court reasoned that it "would not read the ADEA to cover state judges unless Congress has made it clear that judges are included." *Id.* (emphasis in original).

The Court's application of the plain statement rule in Gregory rested on two concerns. The first was the nature of the state interest involved. The Court emphasized that the Missouri constitutional provision was not just "an area traditionally regulated by the States, [but] a decision of the most fundamental sort for a sovereign entity." ___ U.S. at ___, 111 S.Ct. at 2400. According to the Court, "the authority of the people of the States to determine the qualifications of their most important government officials ... lies at 'the heart of representative government.' " *Id.* at ___, 111 S.Ct. at 2402. The second concern was the nature of the power being exercised by Congress under the ADEA. Although there was some argument that Congress acted

pursuant to its enforcement powers under the Fourteenth Amendment in passing the ADEA, the Court in Gregory ultimately concluded that Congress had acted only pursuant to its Commerce Clause powers. See *id.* at ___, 111 S.Ct. at 2404-06. The Court thus expressed its rationale for applying the plain statement rule when it said: "As against Congress' powers '[t]o regulate Commerce ... among the several States,' U.S. Const. Art. I, § 8, cl. 3, the authority of the people of the States to determine the qualifications of their government may be inviolate." *Id.* at ___, 111 S.Ct. at 2402-03.

The concerns underlying the Court's application of the plain statement rule in Gregory do not, in our view, exist in this case. Section 2 of the Voting Rights Act does not impinge on the authority of the states to set qualifications for their elected officials. Rather, by its terms, Section 2 only impinges on the authority of states to employ certain election practices— namely, those which result in a denial or abridgment of the right to vote on account of race. Furthermore, it is clear that, when Congress amended Section 2, it was acting pursuant to its enforcement powers under the Fourteenth and Fifteenth Amendments. Congress specifically concluded that, "to enforce fully the Fourteenth and Fifteenth Amendments, it is necessary that Section 2 ban election procedures and practices that result in a denial or abridgment of the right to vote." S.REP. at 40, 1982 U.S.C.C.A.N. at 218 (emphasis added).

Moreover, even if we were to apply the plain statement rule in determining whether Section 2 provides for the balancing of state interests against proven vote dilution, we would be inclined to hold that Congress plainly intended that no such balancing should occur.[12] After all, as

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[12]As Judge Higginbotham persuasively explained in his concurring opinion in *League of United Latin American Citizens v. Clements*:

We have insisted in other contexts that Congress clearly state its

(continued...)

previously discussed, Congress has indicated in the Senate Report accompanying the amended Section 2 that even if the challenged election procedure is consistently applied and premised on a racially neutral policy, such proof does "not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the [political] process." S.REP. at 29 n. 117, 1982 U.S.C.C.A.N. at 207 n. 117. Along the same lines, the Senate Report further notes that the failure to prove that the state's interests are tenuous "is not rebuttal evidence of non-dilution." *Id.* at 29 n. 118, 1982 U.S.C.C.A.N. at 207 n. 118. Finally, after carefully considering Congress' primary purpose in amending Section 2, we believe that examining a state's motives beyond the limited inquiry into tenuousness

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[12](...continued)
intent to supplant traditional state prerogatives. Judicial insistence upon clear statement is an important interpretative tool vindicating concern for separation of powers and federalism. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (Pennhurst II). This insistence upon "an unequivocal expression of congressional intent," *Pennhurst II*, 465 U.S. at 99, 104 S.Ct. at 907, is based upon the fundamental nature of the interests at stake, *Atascadero*, [473 U.S. at 242] 105 S.Ct. at 3147 ("The 'constitutionally mandated balance of power' between the states and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.' ") (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572, 105 S.Ct. 1005, 1028, 83 L.Ed.2d 1016 (1985) (Powell, J., dissenting)). These mighty principles do not carry us very far here. Congress has clearly expressed the [Voting Rights] Act's application to the states, and has clearly expressed its intent that violations of the Act be determined by a results test rather than an intent standard. By these actions, the Act, with all of its intrusive effect, has been made to apply to the states.

914 F.2d 620, 641-42 (5th Cir.1990) (Higginbotham, J., concurring in the judgment) (emphasis in original) (parallel citations omitted), rev'd and remanded, ___ U.S. ___, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991).

would be inconsistent with that purpose. Congress has indicated that, when a plaintiff proceeds under the "results test" of Section 2, the court should "assess the impact of the challenged structure or practice on the basis of objective factors, rather than making a determination about the motivations which lay behind its adoption or maintenance." S.REP. at 27, 1982 U.S.C.C.A.N. at 205.

Nor are we prepared to hold, as Judge Entz would have us do, that Congress' failure to provide for a balancing of state interests against proven vote dilution renders Section 2 unconstitutional.[13] In *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984), the Supreme Court summarily rejected the argument that Section 2, "if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." *Id.* at 1003, 105 S.Ct. at 416. We have similarly rejected a broad challenge to Congress' power to amend Section 2 and prohibit election practices that produce discriminatory results. In *Jones v. City of Lubbock*, 727 F.2d 364, 373 (5th Cir.1984), we stated that "Congressional power to adopt prophylactic measures to vindicate the purposes of the fourteenth and fifteenth amendments is unquestioned." We noted that Congress did not lightly interfere with state and municipal self-governance. *Id.* at 374 n. 5. Instead, we found that, in

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[13]Judge Entz makes four arguments in this regard. First, he argues that applying the accepted Section 2 framework to state trial judges would violate Tenth Amendment federalism principles. He further argues, citing THE FEDERALIST No. 48 (J. Madison) (J. Cooke ed. 1961) and the Texas Constitution, that an application of the accepted Section 2 framework would violate separation of powers principles. Third, he argues that the 1982 amendments to Section 2 were not a valid exercise of Congress' authority under the Fourteenth and Fifteenth Amendments. And finally, he argues that Section 2, if applied without balancing state interests, is unconstitutionally vague. For the reasons discussed in the text, we reject all of these arguments.

light of the legislative fact-finding accompanying the amendment and the limited nature of the intrusion into state and municipal self-determination, Congress had not offended any other provision of the Constitution. *Id.*; *see also City of Rome v. United States*, 446 U.S. 156, 173-75, 100 S.Ct. 1548, 1559-1560, 64 L.Ed.2d 119 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 334, 86 S.Ct. 803, 822, 15 L.Ed.2d 769 (1966). But see *Chisom v. Roemer*, ___ U.S. ___, ___, 111 S.Ct. 2354, 2376, 115 L.Ed.2d 348 (1991) (Kennedy, J., dissenting) (clarifying that the Court was not addressing the constitutional validity of Section 2).

We recognize that in *Gregory* the Court indicated that "the Fourteenth Amendment does not override all principles of federalism." ___ U.S. at ___, 111 S.Ct. at 2405. The Court noted, however, "that the principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments." *Id.* The reason federalism principles are attenuated in this context, the Court explained, "is because those 'Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.' " *Id.* (quoting City of Rome, 446 U.S. at 179, 100 S.Ct. at 1563). Thus, although Congress may not act to enforce the Civil Rights Amendments "in complete disregard of" the powers retained by the states, Gregory, ___ U.S. at ___, 111 S.Ct. at 2405, concerns of federalism must not be allowed to emasculate Congress' power to adopt prophylactic measures to vindicate the purposes of those Amendments.

c. *The Supreme Court's decision in Houston Lawyers' Association.* Were it not for isolated passages in the Supreme Court's decision in this case, we would likely conclude that the proposed balancing framework is not grounded in law. However, when the Supreme Court held that Section 2 applies to the election of state district court judges in Houston Lawyers' Association, it also used language suggesting that state interests might have to be balanced against proven vote dilution. Relying on the

Court's suggestions, the State Defendants, Judge Wood, and Judge Entz argue that state interests must be balanced against proven vote dilution.

There are two passages in the Court's opinion in *Houston Lawyers' Association* that provide support for the proposed balancing framework. The first one reads as follows:

> Even if we assume, *arguendo*, that the State's interest in electing judges on a district-wide basis may preclude a remedy that involves redrawing boundaries or subdividing districts, *or may even preclude a finding that vote dilution has occurred under the "totality of the circumstances" in a particular case,* that interest does not justify excluding elections for single-member offices from the coverage of the § 2 results test. Rather, *such a state interest is a factor to be considered by the court in evaluating whether the evidence in a particular case supports a finding of a vote dilution violation* in an election for a single-member office.

___ U.S. at ___, 111 S.Ct. at 2380-81 (emphasis added). In the second such passage, which follows the Court's rejection of the argument that "the 'single-member office' theory automatically exempts certain elections from the coverage of § 2," the Court states:

> Rather, we believe that the State's interest in maintaining an electoral system—in this case, Texas' interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters—*is a legitimate factor to be considered by courts among the "totality of circumstances" in determining whether a § 2 violation has occurred.* A State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry, and the Fifth Circuit has expressly approved the use of this particular factor in the *balance of considerations.* See *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (CA5 1973), aff'd *sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976).

> Because the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices is merely one factor to be considered in evaluation the "totality of the circumstances," *that interest does not automatically, and in every case, outweigh proof of racial vote dilution.*

Id. at ___, 111 S.Ct. at 2381 (emphasis in original and emphasis added) (internal citations omitted). In both of these passages, the underscored language suggests that courts should balance state interests against proven vote dilution.

Other parts of the Court's opinion in *Houston Lawyers' Association* suggest that the Court was not substituting a new balancing framework for the one set forth in Section 2. Initially, the Court stated that it granted certiorari "for the limited purpose of considering the scope of the coverage of § 2." ___ U.S. at ___, 111 S.Ct. at 2380. The Court focused specifically on whether judicial elections are subject to Section 2, and its narrow holding was: "If a State decides to elect its trial judges, as Texas did in 1861, those elections must be conducted in compliance with the Voting Rights Act." *Id.* In addition, before the Court made any statement suggesting that balancing of state interests might be required, it stated that it was "deliberately avoid[ing] any evaluation" of the state interest arguments made by Judge Higginbotham in his concurrence below. *Id.* Such matters, the Court continued, "are relevant *either* to an analysis of the totality of the circumstances that must be considered in an application of the results test embodied in § 2, as amended, *or to a consideration of possible remedies in the event a violation is proved,* but not to the threshold question of the Act's coverage." *Id.* (emphasis added).

Further, in the second passage (quoted above) relied on to support a balancing framework, the Court begins by recognizing that the state interest in maintaining an electoral system is "*a legitimate factor* to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred." *Id.* at ___, 111 S.Ct. at 2381

(emphasis added). The Court then notes that this court "has expressly approved the use of this particular factor in the balance of consideration[s]" and cites our opinion in *Zimmer*, 485 F.2d at 1305, which formed the basis for the treatment of state interests in the Senate Report. The inquiry into state interests in the Senate Report is limited to an inquiry into whether the state interest is tenuous, and if so, it is a factor supporting a finding of dilution. This reference to *Zimmer*, in our view, suggests that the Court did not intend to substitute a balancing framework.[14]

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[14]Judge Higginbotham interprets the Court's reference to *Zimmer* in another way and suggests, by quoting an isolated passage from our decision in *Zimmer*, that we held that "a strong state policy divorced from the maintenance of racial discrimination," could by itself preclude a holding of vote dilution. Dissenting Op. at [413a]. A careful reading of our *Zimmer* decision reveals that Judge Higginbotham's partial quotation is flawed. In *Zimmer*, we stated:

> The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multimember districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, *Whitcomb v. Chavis*, *supra*, would require a holding of no dilution. *Whitcomb*, would not be controlling, however, where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination. *Conversely*, where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi- member or at-large districting, *or* that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the

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That the Court in *Houston Lawyers' Association* did not mean to substitute a balancing framework is further supported by what is absent from the Court's opinion. The Court's decision does not mention, much less discuss, either the Senate Report or *Thornburg v. Gingles*. We question whether the Court would alter the Section 2 framework without reference to either of these authorities. Nor does the Court's decision indicate why such a balancing framework would be required. There is no discussion in *Houston Lawyers' Association* of congressional intent or of federalism principles. The absence of such a discussion, in our view, suggests that the Court did not mean to require courts to balance state interests against proven vote dilution.

Also, in *Chisom v. Roemer*, decided the same day as *Houston Lawyers' Association*, the Court expressly disavowed any intention to alter or amend the elements of a vote dilution claim. The Court stated that it was not addressing "any question concerning the elements that must be proved to establish a violation of the [Voting Rights] Act or the remedy that might be appropriate to redress a violation if

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[14](...continued)

existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in *White v. Regester*, *supra*, demonstrates, however, that all these factors need not be proved in order to obtain relief.

485 F.2d at 305 (emphasis added). When this passage is read in its context, then, it becomes clear that our treatment of state interests in *Zimmer*, rather than supporting the balancing framework advocated by Judge Higginbotham, is consistent with Congress' treatment of state interests in the Senate Report—namely, that the inquiry is whether the asserted state interests are tenuous. We have never held, in *Zimmer* or otherwise, that a "strong state policy divorced from the maintenance of racial discrimination," could by itself "outweigh" other factors pointing towards vote dilution.

proved." *Id.* at ___, 111 S.Ct. at 2361. It is difficult to believe that the Supreme Court would issue one opinion expressly disavowing any intention to alter the elements of a Section 2 claim, and on the same day issue another opinion which, sub silentio, recasts the elements of such a claim.

Finally, prior to *Houston Lawyers' Association*, the Supreme Court has on several occasions rejected the argument that state interests may preclude relief from an election scheme violating federal law. In *Mahan v. Howell*, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320, *modified*, 411 U.S. 922, 93 S.Ct. 1475, 36 L.Ed.2d 316 (1973), which involved a challenge to the apportionment plan for the Virginia legislature, the Court rejected the state's argument that its interest in drawing legislative districts to conform to county and city boundaries justified some population deviation between districts. Then-Justice Rehnquist wrote for the Court that "a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality." *Id.* 410 U.S. at 326, 93 S.Ct. at 986. The Court rejected a similar argument in *White v. Weiser*, 412 U.S. 783, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973). In *White*, the State of Texas defended its congressional reapportionment plan on the ground that it had an interest in preserving the relationships between incumbent legislators and their constituents. *Id.* at 791, 93 S.Ct. at 2352. While the Court did not "disparage this interest," it held that district courts should defer to state policy "only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge." *Id.* at 791, 797, 93 S.Ct. at 2353, 2355.

Accordingly, we conclude that *Houston Lawyers' Association* is, at best, ambiguous about the proper role of evidence regarding state interests in Section 2 analysis. The passages relied on by the State Defendants, Judge Wood, and Judge Entz suggest that state interests may be relevant in determining whether there is a violation of Section 2.

And, in at least one of those passages, the Court uses language suggesting that state interests might have to be balanced against proven vote dilution. In the same breath, however, the Court (1) emphasizes the limited scope of its holding, (2) refuses to address Judge Higginbotham's concurring opinion regarding the importance of state interests, and (3) notes that it is appropriate to consider state interests when imposing a remedy for a Section 2 violation. Given this ambiguity, we cannot say that the proposed balancing framework is wholly unsupported by the law.

2. The Practical Problem

Section 2 demands a great deal from district courts. They must "consider the totality of the circumstances and ... determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters." *Gingles*, 478 U.S. at 79, 106 S.Ct. at 2781 (internal quotation marks and citations omitted). "This determination is peculiarly dependent on the facts of each case, and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Id.* (internal quotation marks and citation omitted). Moreover, because Section 2 cases require close analysis of "extraordinarily fact-oriented issues[,]" we have held that, under Rule 52(a) of the Federal Rules of Civil Procedure, a district court is "required to discuss all the substantial evidence contrary to its opinion." *Velasquez v. City of Abilene*, 725 F.2d 1017, 1020 (5th Cir.1984).

The balancing framework possibly suggested in *Houston Lawyers' Association* would further complicate this already complex undertaking. Because the state interests would not be a signal of dilution like the other Section 2 factors (including the tenuousness of the state interests), a court analyzing a Section 2 claim under the proposed balancing framework would no longer ask only whether, under the totality of the circumstances, there is an unequal opportunity to participate in the political process. The court would also ask whether, in light of the state interests, the unequal

opportunity to participate is sufficiently unequal to support a finding of liability under Section 2. In other words, the state interests would have to be weighed *against* proven vote dilution. *See Houston Lawyers' Association*, ___ U.S. ___, 111 S.Ct. at 2381. The problem with such a framework, from a district court's perspective, is the lack of standards for such an approach. Neither the Supreme Court's decision in *Houston Lawyers' Association* nor Section 2 provides any guidance for determining whether the state interests are substantial enough—or whether the proof of vote dilution is insubstantial enough—to excuse the state from Section 2 liability.

The proposed balancing framework becomes even more complicated when we consider the number of state interests and the possible remedies that might be implicated in any case. Although state election schemes generally embody several state policy choices, see, e.g., *infra* Part III.D.1., the only state interests threatened in a Section 2 case are those that would be trammeled by a proposed remedy. Thus, the only way to identify the threatened state interests would be to identify a remedy. This difficulty in identifying the threatened state interests is not present in the non-balancing framework described in Part II, where a court must only ask whether the state interest is tenuous. The proposed balancing framework, on the other hand, would apparently require a district court to assess the potential damage to each of the various state interests during the liability phase of a Section 2 case, before the need for a remedy has been absolutely determined. In short, a district court would have to weigh, against a showing of minority vote dilution, each of the state interests, as that interest is affected by each of the possible remedies. Such a complicated balancing act would be required, because it is the only way to fairly assess the strength of the asserted state interests.

3. *Summation*

In sum, although there are legal and practical problems with the proposed balancing framework, we need not decide whether such a framework is required in this case. After a

careful review of the state interests asserted in this case, see *infra* Part III.D., we conclude that even if *Houston Lawyers' Association* were read to require courts to balance state interests against proven vote dilution, the Plaintiffs in this case would still prevail in the eight counties in which they have demonstrated vote dilution under Section 2, *see infra* Part IV. Their evidence establishes substantial vote dilution in each of the eight counties, and as discussed below, the interests asserted by the state are little more than tenuous. Moreover, there are several potential remedies that could cure the proven vote dilution while simultaneously protecting the asserted state interests.

D. Applying the Proposed Balancing Framework in this Case: Evaluating Texas' Asserted Interests

Before we can weigh the asserted state interests against proven vote dilution, see *infra Part IV.C.*, we must evaluate Texas' asserted interests. Our evaluation proceeds in three steps. First, we identify the threatened state interests. Second, we scrutinize those threatened state interests. And finally, we assign a weight to the threatened state interests.

1. *Identifying the Threatened State Interests*

In evaluating the state interests in a challenged election scheme, a court must first, as a matter of law, identify those interests that would be threatened by possible remedies. To identify state interests in an election scheme or practice, a court may look to state statutes and constitutions. *See White v. Weiser*, 412 U.S. 783, 795, 93 S.Ct. 2348, 2355, 37 L.Ed.2d 335 (1973) (in the context of legislative reapportionment, a federal court "should follow the policies and preferences of the State, *as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature*," to the extent possible under federal law) (emphasis added). A court may also look to evidence introduced at trial. To identify the subset of state interests that are *threatened* by a finding of vote dilution, however, a court must consider all possible remedies. As discussed above, only the interests that are threatened by a proposed remedy need be considered under the proposed balancing

framework.

Texas has various interests in the current method of electing district court judges. Among those expressed in the state statutes and constitution are the following: an interest in an elected judiciary;[15] an interest in partisan judicial elections;[16] an interest in a qualified judiciary;[17] an interest in having district judges reside in the district in which they serve;[18] and an interest in requiring judicial candidates to refrain from certain kinds of political activity.[19] Based on testimony and evidence at trial, the district court identified other state interests in Texas' current scheme of electing district judges. These include: an interest in an electorate informed about the qualifications of candidates for district court judgeships; an interest in preserving the administrative advantages of at-large elections; an interest in allowing

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[15]The Texas Constitution requires that each district judge be elected. See TEX. CONST. art. V, § 6.

[16]*See generally* Tex.Elec.Code Ann. §§ 161.001-182.007 (Vernon 1986).

[17]Under the Texas Constitution, all district judges must be licensed to practice law in the state and must have practiced law for at least four years prior to their election. See TEX. CONST. art. V, § 6.

[18]The Texas Constitution requires that all district judges reside in the district during the term of office. See TEX. CONST. art. V, § 6. Further, a district judge candidate must have resided in the district for two years prior to the election. See *id.*

[19]The Texas Code of Judicial Conduct prohibits judicial candidates from making statements that indicate an opinion on an issue that might be subject to judicial interpretation. See Texas Supreme Court, CODE OF JUDICIAL CONDUCT, Canon 7 (Vernon Supp.1992) [hereinafter TEX.CODE OF JUDICIAL CONDUCT]. The Code further prohibits district judge candidates from making pledges or promises of conduct in office. See *id.*

judges to specialize in areas like family law; a "linkage" interest in electing district judges from the area over which they have "primary jurisdiction"; and finally, an interest in preserving the function of the district court judge as a sole decisionmaker.[20]

Most of the interests listed above are not threatened by any of the possible remedies in this case. Neither subdistricting, cumulative voting, nor limited voting would threaten Texas' asserted interests in having an elected and qualified judiciary or in having partisan judicial elections. Moreover, none of the possible remedies would threaten Texas' interests in requiring that judges reside in the district in which they serve and refrain from certain forms of political activity. Finally, the state interest in an informed electorate would be enhanced by at least some of the proposed remedies and threatened by none of them.

Four of the interests listed above, however, appear to be threatened to some extent by some or all of the proposed remedies. Texas' interest in preserving the administrative advantages of the current at-large election system is threatened to some extent by all of the possible remedies. Texas' interest in allowing judges to specialize may also be threatened to a minimal degree, but only by a strict subdistricting remedial scheme. Texas' linkage interest may also be threatened by a subdistricting remedy. Finally, we are told that Texas' interest in preserving the fact and

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[20]On appeal, Judge Entz raises other state interests that he asserts are advanced by Texas' current method of electing district court judges. According to Judge Entz, Texas' current method of electing district judges also (1) reflects Texas' citizens' expression of self-government, (2) protects litigants from disenfranchisement, (3) protects the rights of criminal defendants, (4) allows judges to specialize, and (5) protects minority representation. We do not separately address these asserted interests, because they are either components of the "linkage" or "sole decision-maker" interests being asserted by the State Defendants, were not presented to the district court, or are not threatened by any of the proposed remedies.

appearance of independence in district court judges—that is, in preserving the function of district court judges as sole decision-makers—is threatened by a subdistricting remedy.

2. *Scrutinizing the Threatened State Interests*

Having identified the interests asserted by Texas that would arguably be threatened by possible remedies, we now proceed to scrutinize those interests. It is not enough to evaluate the state interests as a matter of legal or political theory. See *Gingles*, 478 U.S. at 45, 106 S.Ct. at 2764 (in Section 2 case, court must ground its analysis in "a searching practical evaluation of the past and present reality" of the community and its politics, and must take a "functional view of the political process") (quoting S.REP. at 30 & n. 120, 1982 U.S.C.C.A.N. at 207 & n. 120). A court must also examine the practical realities of the challenged election scheme to determine the strength of the asserted interest. *See White v. Weiser*, 412 U.S. at 796, 93 S.Ct. at 2355 (in deciding whether district court erred in choosing one of two apportionment plan options, an appellate court considers the impact of each plan on state apportionment policy); see also *Westwego III*, 946 F.2d at 1123 (concluding, after scrutinizing district court's finding that at-large system was justified by concerns of administrative efficiency, that such a finding was no longer supported by the evidence because of a change in underlying state law). In addition, a court must determine whether the challenged election scheme "does in fact advance" the asserted state interests. See *Mahan v. Howell*, 410 U.S. 315, 329, 93 S.Ct. 979, 987, 35 L.Ed.2d 320 (emphasis added), *modified*, 411 U.S. 922, 93 S.Ct. 1475, 36 L.Ed.2d 316 (1973); see also *id.* 410 U.S. at 326, 93 S.Ct. at 986 ("The inquiry ... [is] whether it can reasonably be said that the state policy urged ... is, indeed, furthered by the plan adopted by the legislature...."). Finally, in scrutinizing the asserted state interests, a court must determine whether any of the proposed remedies will serve the asserted state interests as well as the challenged election scheme. *See White v. Weiser*, 412 U.S. at 791-92, 93 S.Ct. at 2353 (refusing to decide whether state interest was sufficient to

justify legislative apportionment plan, where another proposed plan served the state interest just as well).

The first two state interests that are threatened in this case—namely, Texas' interests in preserving the administrative advantages of the current system and allowing judges to specialize—have received little attention in the parties' briefs. This is because the third and fourth threatened state interests—Texas' interest in "linking the jurisdictional base of district judges directly to the electoral base" and Texas' interest in preserving the function of district court judges—have threatened to assume a larger than life role in this lawsuit. We scrutinize each of these interests in turn.

a. *Texas' interest in preserving the administrative advantages of the current at-large system.* As a practical matter, we can agree that any of the proposed remedies will result in Texas losing some administrative advantages of its current method of electing judges. We can also agree that maintenance of the current method of electing Texas district court judges does to a considerable extent further the state's administrative interest. We note, however, that elevating Texas' administrative interest in the liability phase of a Section 2 case to a dispositive position would be contrary to our decision in *Westwego I*, where we held that the district court should not consider the potential disruption of reorganizing an administrative structure in determining whether an at-large electoral system violates Section 2. 872 F.2d at 1211. More importantly, however, it must be acknowledged that, in passing the 1985 constitutional amendment permitting the creation of judicial districts smaller than a county, see TEX. CONST. art. V, § 7a(i), the Texas legislature and the voters considered the potential loss of administrative advantages and concluded that the advantages in such smaller districts outweighed any loss of administrative advantages under the current system. The voters have spoken to this issue.

b. *Texas' interest in allowing judges to specialize.* Our scrutiny of Texas' interest in allowing judges to specialize

reveals one major weakness in this interest: Several of the proposed remedies would advance the interest just as well as the current election scheme. Under a cumulative voting scheme, for example, judges could still specialize. Voters would not be required to cast a vote for specialized judges, but would nonetheless have the opportunity to cast one or more of their votes for such judges. Moreover, a subdistricting remedy could also protect the interest in allowing judges to specialize. Under a flexible subdistricting remedy, specialized judges would not necessarily have to be elected from districts the same size as district court judges who do not specialize. And, if a subdistricting election scheme for a specialized judge could not be devised—e.g., if there were only one family law judge per county—that judge could still be elected on a county-wide basis.

c. *Texas' linkage interest.* As we have previously noted, the so-called "linkage interest"—Texas' interest in linking the elective base of district judges to the area in which they exercise "primary jurisdiction"—has threatened to take on a life of its own in this litigation. The genesis of this interest, it appears, is the testimony of Chief Justice Thomas Phillips of the Texas Supreme Court. At trial, in response to a question asking him whether "it is a good idea to require at least county-wide elections" for district court races, Chief Justice Phillips testified that, in his view, such a requirement was a good idea. In explaining his answer, Chief Justice Phillips stated:

> In my opinion, the district judge should not be responsible to the voters over an area that is smaller than that area in which the district judge exercises primary jurisdiction. If we wanted to go to a system where the judge had primary venue responsibility over an area smaller than the county, I don't know that I would have any objection to electing judges from [an area] smaller than a county. And our Justices of the Peace do ordinarily have jurisdiction primarily over a portion of the county, but as long as we are going to elect judges, as long as judges are going to be responsible for all the

> cases in the county and are going to exercise that kind of power and authority over persons[']lives and as long as they are going to be responsible to the voters, I believe they should be responsible to all the voters of the county, or a multi- county district.

In this somewhat conflicting testimony, the so-called linkage interest was born.

Although Chief Justice Phillips first uses the phrase "primary jurisdiction,"[21] it becomes clear that what he was attempting to describe was two-fold: first, a judge's elective base, and second, a judge's "primary venue responsibility." Thus, although the State Defendants repeatedly speak of the state's interest in terms of "linking the *jurisdictional base* of district judges directly to the electoral base," it is really only the district court's venue that has any link to its electoral base. The terms "jurisdiction" and "venue" are not synonymous under Texas law. *See State v. Pounds*, 525 S.W.2d 547, 550 (Tex.Civ.App.—Amarillo 1975, *writ ref'd* n.r.e.). Jurisdiction "is the power of the court to decide a controversy between parties and to render and enforce a judgment with respect thereto...." *Id.* In Texas, district courts have general, *statewide* jurisdiction—that is, they have the power to hear any case that may be filed in the state of Texas. See TEX. CONST. art. V, § 8 (district courts have jurisdiction of all actions and proceedings except where jurisdiction is conferred on another court or tribunal by the Texas Constitution or by statute). Moreover, a district court's order is effective throughout the state. Venue, on the other hand, "is the proper place where [a court's] power [to decide a specific controversy] is exercised." *Pounds*, 525 S.W.2d at 550. It concerns the propriety of "prosecuting a suit involving a given subject matter and specific parties in a particular county." *Jeter-Millar Co. v. Kasch Bros. Inc.*, 466 S.W.2d 598, 600 (Tex.Civ.App.—Eastland 1971, no writ).

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[21]Our search of Texas constitutional, statutory, and decisional law reveals no concept or definition of the phrase "primary jurisdiction."

Thus, because all but one of the district judges in this case are elected from county-wide judicial districts, their elective base can only be linked—if it is linked at all—with venue, not jurisdiction.[22]

Moreover, whatever link may have existed between a district judge's elective base and venue disappeared in 1985. In that year, as we have seen, the state amended its constitutional provision tying a district judge to the county in which he or she was elected. Specifically, the Texas Constitution now permits district judges to be elected from areas smaller than a county when a majority of the voters in such a county approve of such an election scheme. See TEX. CONST. art. V, §§ 7, 7a(i).[23]

The Texas legislature has also weakened the ties between district court judges and the counties which elect them by establishing a mechanism by which district judges can be compelled to periodically sit in other counties. The state of Texas is divided into nine administrative judicial regions, the smallest of which consists of eleven counties. See TEX.GOV'T CODE ANN. § 74.042 (Vernon 1988). The presiding judge of each region may assign judges within the region "to hold special or regular terms of court in any

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[22]Moreover, it bears noting that 27% of Texas' district judges are elected from judicial districts that are larger than a county. See THE AMERICAN BENCH 2138-54 (6th ed. 1991). With regard to these district courts, the link between elective base and venue becomes more tenuous.

[23]In his dissent, Judge Higginbotham places great weight on the fact that no county has voted to elect district judges from areas smaller than a county. Dissenting Op. at [416a]. This does not change our conclusion that the so-called "required link" between elective base and venue is non- existent. The fact is that the Texas Constitution does not presently require that district judges be elected from areas no smaller than a county. Thus, the state has taken a neutral position regarding the elective base of district judges: district judges may be elected from county-wide election districts or they may be elected from districts smaller than a county.

county of the administrative region to try cases and dispose of accumulated business." *Id.* § 74.056(a). The presiding judge of an administrative region may further "request the presiding judge of another administrative region to furnish judges" to aid in the disposition of litigation. *Id.* § 74.056(b). A judge assigned to sit in another county under these provisions "has all the powers of the judge of the court to which he is assigned." *Id.* § 74.059(a). Texas also makes widespread use of retired judges, who are assigned across administrative region lines. See *id.* § 75.002. In view of these provisions, it is simply not possible to conclude that Texas insists on tying its district judges to the counties in which they are elected.[24]

Texas' interest in linking district judges' elective base to the respective areas in which they have venue is further weakened by the operation of the state's venue rules. The Texas venue rules have not been drafted to insure that parties appear before judges for whom they have had an opportunity to vote. Instead, the venue rules for lawsuits involving living persons— including the general venue rule,[25] the mandatory venue exceptions,[26] and the

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[24]For example, under these provisions, any of the fifty-nine district court judges elected in Harris County may be assigned, at any time, to hear and decide cases in any of the thirty-four other counties in the second administrative judicial region. TEX.GOV'T CODE ANN. § 74.042(c) (Vernon 1988). Those same judges may as well be assigned to counties in other administrative judicial regions throughout the entire state. Any judge can be assigned to any county in any region of the state.

[25]The general venue provision in Texas provides: "Except as otherwise provided by [the mandatory venue rules] or [the permissive venue rules], all lawsuits shall be brought in the county in which all or part of the cause of action accrued or in the county of defendant's residence if defendant is a natural person." TEX.COV.PRAC. & REM.CODE ANN. § 15.001 (Vernon 1986).

permissive venue exceptions[27] —"were, in the main, manifestly adopted to prevent serious inconveniences and probable injury to defendants...." *Snyder v. Pitts*, 150 Tex. 407, 241 S.W.2d 136, 142 (1951). Nor do the Texas venue rules operate evenly. When someone who fears being hailed into court as a defendant files an action under Texas' Declaratory Judgment Act, the action will be "subject to the general venue rule and its ... exceptions." *Bracewell v. Fair*, 638 S.W.2d 612, 613 (Tex.App.— Houston [1st Dist.] 1982, no writ). There is no mechanism under Texas' venue rules, it appears, for piercing the form of the lawsuit. See Charles T. Frazier, Jr., Note, *Venue Procedure in Texas: An Analysis of the 1983 Amendments to the Rules of Civil Procedure Governing Venue Practice Under the New Venue Statute*, 36 BAYLOR L.Rev. 241, 260 (1984) (recognizing that, under the current Texas venue rules, a party who anticipates being sued may "capture" venue by filing suit first).

The operation of Texas' venue rules suggests that these rules have not been developed to promote the accountability

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[26](...continued)

[26]There are mandatory venue provisions for the following types of lawsuits: (1) actions involving real property, *see* TEX.CIV.PRAC. & REM.CODE ANN. § 15.011 (Vernon 1986); (2) actions to stay proceedings in an already-pending lawsuit, *see id.* § 15.012; (3) actions to restrain execution of a judgment, *see id.* § 15.013; (4) actions for mandamus against the head of a department of state government, *see id.* § 15.014; (5) actions against a county, *see id.* § 15.015; and (6) actions involving libel, slander, or invasion of privacy, *see id.* § 15.017.

[27]There are permissive venue rules for the following types of actions: (1) suits against an executor, administrator, or guardian, *see* TEX.CIV.PRAC. & REM.CODE ANN. § 15.031 (Vernon 1986); (2) suits against insurance companies, *see id.* § 15.032; (3) suits for breach of warranty by a manufacturer of consumer goods, *see id.* § 15.033; (4) actions involving certain written contracts, *see id.* § 15.035; (5) suits against corporations and associations, *see id.* § 15.036; (6) suits against foreign corporations doing business in Texas, *see id.* § 15.037.

of judges to the litigants appearing before them. Put differently, Texas' venue rules, like the venue rules in the federal courts and in the courts of other states, are not designed to foster judicial accountability. The *most* that can be said for the so-called "linkage interest" is that there may be some rough correlation—a loose link indeed— between a district court's elective base and venue. Perhaps it simply comes down, as Justice Phillips candidly put it, to a "good idea."[28] Finally, Texas' asserted linkage interest is weakened by the availability of several remedies that could cure the dilution caused by the use of at-large elections while simultaneously protecting Texas' linkage interest. For instance, a system of limited voting, in which each voter casts fewer votes than the total number of places to be filled, would allow Texas to continue to select its district judges through county-wide elections—and thereby preserve the "linkage interest"—while also giving minority voters a meaningful opportunity to elect candidates of their choice.

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[28]Judge Higginbotham suggests that we understate the local nature of district courts by overlooking how venue operates in criminal law. Dissenting Op. at [418a]. A review of Texas' criminal venue rules, however, belies Judge Higginbotham's claim that they are somehow designed to foster judicial accountability and independence. First, it is important to note that Texas district courts have "jurisdiction" over any felony committed in whole or part anywhere in Texas. *See Ex Parte Watson*, 601 S.W.2d 350, 351 (Tex.Crim.App.1980). Second, there are over ten separate criminal venue rules in Texas, each depending on the particular offense committed. See TEX.CODE.CRIM.P. art. 13.01 et seq. And, although criminal venue may be "quasi-jurisdictional" in nature, venue can be acquired by "consent" of the parties. *See id.* art. 13.20. Moreover, criminal venue can be waived by a defendant's failure to object at trial. *See Ex Parte Watson*, 601 S.W.2d at 351. Finally, the Texas Code of Criminal Procedure provides various methods for obtaining a change of venue, some of which are meant to protect the rights of a criminal defendant. *See id.* art. 31.01, 31.02, 31.03. Thus, we fail to see how Texas' criminal venue rules operate to ensure that district judges remain accountable to the people who form their elective base.

See Sen. Gene Green, *The Future of Judicial Selection in Texas: Election Methods*, 55 TEX.B.J. 294, 295 (1992); Daniel R. Ortiz, Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 148-50 (1982). A system of cumulative voting, in which each voter is entitled to cast as many votes as seats to be filled and to give her preferred candidate more than one vote, would also protect Texas' "linkage interest." *See* Green, *supra*, at 295; Note, *supra*, at 153-60.

In sum, our scrutiny of Texas' asserted linkage interest reveals several substantial weaknesses in the interest. The first is Texas' refusal to insist that judges in fact be elected from districts no smaller than a county. The second is Texas' willingness to direct judges elected from one county to preside periodically over lawsuits filed in other counties. The third weakness arises from the uneven operation of Texas' venue rules, which do not ensure, even as a general matter, that parties will appear before a judge for whom they have had the opportunity to vote. And fourth, the strength of Texas' linkage interest is weakened by the availability of remedies that will protect it.

d. *Texas' interest in preserving the function of district court judges as sole decision-makers.* Texas maintains that, even if it does not consistently link a district court's elective base with venue, it nonetheless has a distinct, compelling state interest in the function of the district court judge as a sole decision-maker. The argument is essentially as follows: Although in any one county there may be more than one district judge with county-wide, overlapping jurisdiction, each district judge acts alone in wielding power. That is, "[b]efore any suits are filed, before any cases are assigned, there is a group of judges with concurrent jurisdiction...." *League of United Latin Am. Citizens Council No. 4434 v. Clements*, 914 F.2d 620, 649 (5th Cir.1990) (en banc) (Higginbotham, J., concurring) (*LULAC II*). Once a case is assigned, however, "It is decided by only one judge. The other judges have absolutely no say over the disposition of that case, and no influence over the deciding judge." *Id.* Thus, the district

court judge in Texas is not a member of a multi-member body like a city council or even an appellate court that engages in collegial decision-making. Rather, the district court judge in Texas is charged with making his or her decision alone and with exercising exclusively the full authority of the office.

The current method of electing judges, we are told, is necessary to preserve the function of the district court as a sole decision-maker. Electing district judges from an area no smaller than a county ensures that district judges are responsive to all litigants equally and that no particular group will have undue influence over the decisions that must be made alone by the judge. Moreover, under the current method of electing district court judges, minorities can participate in all judicial elections in each county. This opportunity to participate, the argument continues, gives minority voters the opportunity to influence all elections.

A subdistricting remedy, it is argued, poses two threats to Texas' interest in preserving the function of the district court judge as sole decision-maker. First, such a remedy would destroy the appearance if not the fact of independence and responsiveness to all. Said another way: if elected from a subdistrict, a district judge would be prevented from acting alone, or making his or her decisions independently, because the judge would be beholden to the particular racial group who elected him or her. Second, a subdistricting remedy—perversely—would disenfranchise minority voters, because they would no longer be able to influence the outcome of every district court election, but only a few. Such a remedy, the argument goes, makes it probable that a minority litigant would appear "before a judge who has little direct political interest in being responsive to minority concerns." *LULAC II*, 914 F.2d at 650. We address each of these contentions in turn.

Certain parties have suggested on remand that, if minorities are given greater voting strength in district court elections, the function of district court judges as sole decision-makers will be destroyed. Judge Wood argues that

the subdistricting remedy sought by the Plaintiffs runs "directly counter to the historical preference of the citizens of Texas for an elected judiciary in which each judge is accountable to each voter and independent from special interest groups." Judge Wood's Brief on Remand at 31. Judge Wood further suggests that increasing minority voters' ability to sponsor and elect district court candidates of their choice from single member districts would serve no "purpose other than to provide [minority] role models," role models who would apparently serve "specialized interests different from those served by Texas' majority judges." *Id.* at 29. Judge Entz makes similar suggestions. He argues that, under a subdistricting remedy, a trial judge would still be required to exercise his or her authority alone, but the authority, which would necessarily be "derived from voters representing only a fraction of the judge's [current] electoral base," would somehow be tainted. Judge Entz's Brief on Remand at 16.

The argument that any proposed subdistricting remedy would destroy the district judge's ability to act alone or independently is premised on two flawed assumptions. The first flawed assumption is that district judges elected from smaller election districts will not abide by their oaths. The Texas Code of Judicial Conduct charges judges with applying the law and states that an honorable judiciary separated from the influence of others is "indispensable to justice in our society." TEX.CODE OF JUDICIAL CONDUCT, Canon 1. The Code also stresses that "[a] judge should be unswayed by partisan interests, public clamor, or fear of criticism." *Id.* Canon 3, pt. A(1). These directives, by which we must assume judges will abide, effectively negate any concern about a judge's ability, even one elected from a subdistrict, to continue making his or her decisions alone.[29] The

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[29]At trial, several parties contended that judges elected from smaller election districts would be more susceptible to undue

(continued...)

second flawed assumption is a more disturbing one. Underlying the argument that a subdistricting remedy would destroy a district judge's ability to act independently is the following assumption: while district judges who are currently elected by white majorities in each of the counties at issue are responsive to the needs of all voters in the county—including minority voters—a judge who would be elected by minorities in a single-member district would be unresponsive to the current white majority. The flaw in this assumption being clear, we will not address it further.

More important, this argument has been implicitly rejected by the Texas legislature and Texas voters in 1985. By amending the Texas Constitution to allow for the election of district judges from an area smaller than a county, *see* TEX. CONST. art. V, § 7a(i), the Texas legislature and Texas voters must have concluded that district judges who are elected from an area smaller than a county could continue to make their decisions alone and independently. In short, the voters have spoken to this concern.

The second contention raised by the parties in connection with the single- member office theory is that, because there is no share of district court judgeships,

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[29](...continued)
influence from organized crime. In view of the vast differences in the size of Texas' current judicial districts, such a contention is without merit. Texas has created numerous judicial districts with relatively small populations. In two districts, less than 12,000 people constitute the electorate. In six more districts, less than 20,000 constitute the electorate. Finally, in thirty-one judicial districts, less than 40,000 constitute the electorate. *See* Appendix I (table of judicial districts with fewer than 40,000 people in the electorate). Even if a single-judge subdistricting remedy were imposed in this case, the resulting subdistricts would have populations ranging from 27,545 to 52,042. *See* Appendix II (table of potential subdistricts). Given that every single-judge subdistrict would thus be larger than several existing districts, it is not possible to conclude that a single-judge subdistricting remedy would increase the risk of undue influence from organized crime.

creating safe minority district court positions would disenfranchise minorities. Judge Entz argues that, under the current method of electing district court judges, voters of all races are permitted to influence every judicial election in the county. Judge Entz's Brief on Remand at 17. An alternative system would, in Judge Entz's view, "fix geographical and racial power and influence over judicial elections for all time—and actually limit the numbers of judicial benches possible for a growing minority population." *Id.* According to Judge Wood, the subdistricting remedy sought by the Plaintiffs in this case would disenfranchise all the voters in each of the counties at issue, "thereby greatly *decreasing* minority voting power." Judge Wood's Brief on Remand at 31.

Again, the argument about the disastrous results of subdistricting is flawed. The argument that in subdistricting judicial positions, "[minority] voters will ... be sacrificing [an] extremely valuable political right—the right to vote for all of the judges who will be serving as judges in the [county] wherein they live," *see Southern Christian Leadership Conference of Alabama,* 785 F.Supp. at 1478—smacks of paternalism. It essentially tells minority voters in each of the target counties in this case that they must somehow be saved from themselves. In our view, it is not difficult to understand why minority voters would willingly "sacrifice" their ability to vote for all judges and elect none for the ability to vote for and elect a few judges. Indeed, Congress amended Section 2, at least in part, to allow minority voters to make such a sacrifice.

In sum, after scrutinizing Texas' interest in preserving the function of district court judges as sole decision-makers, we conclude that this interest is not actually threatened by any of the proposed remedies—including subdistricting. There is no evidence in this record suggesting that judges elected from smaller districts, or judges elected from districts in which minority voters constitute a majority, would be any less independent in deciding cases. Nor is there any evidence suggesting that judges elected from such districts

would be any less sensitive to the diverse interests of the litigants than the judges who are currently elected from larger districts.

3. *Assigning a Weight to the Threatened State Interests*

Assuming that courts are required to apply a new balancing framework to Section 2 claims, we think that the weight assigned to any state interests is probably a question of law.[30] We note that, to a limited extent, the inquiry into the weight of the state interests is not novel. That is, from the beginning, vote dilution cases have focused on the tenuousness of the state interests. *See, e.g., Cross v. Baxter*, 604 F.2d 875, 878, 884 (5th Cir.1979); *Zimmer*, 485 F.2d at 1305, 1307. District courts deciding these cases have assigned tenuous or non-tenuous weights to the various interests asserted by the affected jurisdictions. *See, e.g., Canton Branch, NAACP v. City of Canton*, 472 F.Supp. 859, 876 (S.D.Miss.1978). Appellate courts appear to have

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[30]In analogous areas of the law—including substantive due process, equal protection, and first amendment law—the weight of an asserted state interest has always been resolved by the court as a legal question. For example, in *Posadas de Puerto Rico Association v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986), the Court had "no difficulty in concluding that the Puerto Rico Legislature's interests in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest." In reaching this conclusion, the Court did not refer to the clearly erroneous rule, but instead made its own, de novo determination of the weight of the state interest. *See also Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 682 (3rd Cir.1991) (holding that determination of whether a legislative scheme is rationally related to a legitimate government interest is a question of law for the court to decide), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1668, 118 L.Ed.2d 389 (1992); *Magill v. Lynch*, 560 F.2d 22, 27 (1st Cir.1977) (reviewing de novo the district court's determination that municipality's interests were not sufficiently compelling to justify prohibiting city employees from engaging in a broad range of political activities), *cert. denied*, 434 U.S. 1063, 98 S.Ct. 1236, 55 L.Ed.2d 763 (1978).

looked at the weight of the state interests afresh without deference to the district courts' decisions. *See, e.g., Zimmer*, 485 F.2d at 1307. In all cases, courts addressing the tenuous or non-tenuousness of the state interests have done so without explaining whether the decision is a question of law or fact. Given the legal sources that underlie the determination, we think that the strength of the state interests may be a legal question. But, in candor, we are not certain that it has made any difference what kind of a question it is. It is important, however, that the inquiry about the weight of a state interest, at least to the extent of determining whether it is tenuous, is a familiar question.

Even though the weight of Texas' threatened interests may be a legal question which we could determine *de novo*, we find ourselves in agreement with much of what the district court had to say about Texas' asserted interests. In particular, we agree with the district court that, while the threatened state interests underlying Texas' current method of electing district judges are not tenuous, they are not compelling either. On the basis of our scrutiny of those interests, we conclude that Texas' interests in (1) preserving the administrative advantages of the current at-large system, (2) allowing judges to specialize, (3) linking the elective base of district court judges with venue, and (4) preserving the function of district court judges are at best "legitimate state interests." They are not, based on our review of Texas law and the practical realities of the Texas judicial system, compelling or substantial state interests. Accordingly, in any proposed balancing framework, they would be entitled to little weight.

IV. REVIEW OF THE DISTRICT COURT'S SECTION 2 LIABILITY FINDINGS

Having set forth the analytical framework (or frameworks) for analyzing Section 2 claims, we now proceed to the question framed at outset of this opinion: Did the district court err in concluding that the method by which Texas elects district court judges—as that method operates

in the nine target counties—violates Section 2 of the Voting Rights Act? Because of the uncertainty about the relevance of state interests in Section 2 analysis, we think it prudent, in answering this question, to evaluate the district court's findings under both the accepted analytical framework and the proposed balancing framework. Before reviewing the district court's findings under the two frameworks, however, we explain the standard of appellate review.

A. Standard of Appellate Review

The standard of appellate review for findings made in a Section 2 case is the clearly erroneous standard set forth in Rule 52(a) of the Federal Rules of Civil Procedure. The Supreme Court made this clear in *Gingles* by "reaffirm[ing]" that the ultimate Section 2 liability or vote dilution finding is reviewed for clear error. See 478 U.S. at 79, 106 S.Ct. at 2779. We have also recognized that the district court's subsidiary findings under the *Gingles* threshold inquiry and the totality of circumstances inquiry—with the possible exception of the tenuousness of the state interests, see *supra* Part III.D.3—are also reviewed under the clearly erroneous standard. See *Westwego I*, 872 F.2d at 1203; *Campos v. City of Baytown*, 840 F.2d 1240, 1243 (5th Cir.1988), *cert. denied*, 492 U.S. 905, 109 S.Ct. 3213, 106 L.Ed.2d 564 (1989).

The reason we apply such a standard of review is due to the nature of the vote dilution inquiry. As the Supreme Court in *Gingles* recognized, the vote dilution determination under Section 2 is "peculiarly dependent upon the facts of each case" and requires "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79, 106 S.Ct. at 2779 (internal quotations and citations omitted). Moreover, "the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Id.*

Even under the clearly erroneous standard set forth in Rule 52(a), a district court's factual findings may be set aside if they rest on an erroneous view of the law.

Pullman-Standard v. Swint, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). As we stated in *Armco, Inc. v. Armco Burglar Alarm Co.*, 693 F.2d 1155 (5th Cir.1982): "When a finding of fact is based on a misapprehension of governing legal standards, it loses the insulation of the 'clearly erroneous' rule." *Id.* at 1162. Once a district court's finding loses the insulation of the clearly erroneous rule, however, "a remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard*, 456 U.S. at 292, 102 S.Ct. at 1792 (emphasis added). A remand is generally proper, according to the Supreme Court, because it is the district court, and not the court of appeals, who is "charged with the task of factfinding in the first instance." *Id.* at 293, 102 S.Ct. at 1792.

If the district court applies the appropriate legal standards in making a finding of fact, under Rule 52(a) we will not set aside that finding unless, based upon the entire record, we are "left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety," we will not reverse it—even if convinced that had we "been sitting as the trier of fact, [we] would have weighed the evidence differently." *Anderson*, 470 U.S. at 573-74, 105 S.Ct. at 1511. Moreover, we give "due regard ... to the opportunity of the trial court to judge of the credibility of the witnesses." FED.R.CIV.P. 52(a). This reluctance to reverse a district court's findings under the clearly erroneous standard persists "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." Anderson, 470 U.S. at 574, 105 S.Ct. at 1511-1512.

B. Review of the District Court's Vote Dilution Findings Under the Accepted Section 2 Framework

Our review of the district court's vote dilution findings under the accepted Section 2 framework proceeds in three parts. In the first part, we discuss the methodology used by the Plaintiffs and accepted by the district court, and address the general attacks on that methodology by the State Defendants, Judge Wood, and Judge Entz. In the second part, we review the district court's subsidiary fact findings under the *Gingles* threshold inquiry and the totality of circumstances inquiry, as well as the district court's ultimate vote dilution finding in each of the nine counties. Finally, in the third part we consider the impact of the evidence of partisan voting patterns on the district court's ultimate vote dilution findings.

1. *Statistical Methodology*

At trial, the Plaintiffs relied heavily on statistics to establish that Texas' method of electing judges results in vote dilution in each of the nine target counties. To establish the first *Gingles* factor—the size and geographical compactness of the minority group—the Plaintiffs used voting age population data from the 1980 Census. To establish the second and third *Gingles* factors—the political cohesiveness of the minority group and legally significant white bloc voting—as well as the existence of racially polarized voting, the Plaintiffs performed certain statistical analyses on results from various elections. Finally, the Plaintiffs relied on statistics to establish certain factors that are relevant to the totality of circumstances inquiry—namely, the lingering socioeconomic effects of discrimination and the extent to which minorities have been elected to public office.

Because of the position of the second and third *Gingles* factors and racially polarized voting in Section 2 analysis, it is important to outline the Plaintiffs' statistical methodology with regard to these factors. There are three aspects to this methodology: (1) the subset of elections that the Plaintiffs chose to analyze; (2) the manner in which the Plaintiffs

isolated the race of the voters in the nine target counties; and (3) the types of analyses the Plaintiffs chose to perform on the particular election results.

With regard to the elections that were analyzed, the Plaintiffs' experts, Dr. Engstrom and Dr. Brischetto, were guided by several principles. They only studied elections in which a minority candidate opposed a white candidate. Also, they preferred to analyze general elections as opposed to primary elections; however, they analyzed primary elections when no minority candidate made it past that stage of the electoral process. Finally, they preferred to analyze state district court elections. If, however, there were no district court elections or primaries in which a minority candidate opposed a white candidate, the Plaintiffs' experts looked, in the following order of preference, to county court elections, justice of the peace elections, and statewide judicial races.

In isolating the independent variable for their statistical analyses, the racial composition of election precincts, the Plaintiffs' experts took various approaches, depending on the availability of data. In counties where the Plaintiffs were proceeding only on behalf of Hispanics, they relied on Spanish surname counts done by the Texas Secretary of State to determine the percentage of Hispanic registered voters in any given precinct. In other instances—for example, in Harris and Dallas counties—the Plaintiffs' experts used updated counts of Black and Hispanic total or voting age population in each precinct of the county. If such counts were not available, then the Plaintiffs' experts relied on data from the 1980 Census. When relying on census data, the Plaintiffs' experts calculated the number of non-minorities within precincts by subtracting the number of Hispanics and Blacks from the total number of persons within the precinct.

The Plaintiffs' experts performed two types of analyses on the data sets that were obtained: ecological regression analysis and extreme case or homogeneous precinct

analysis.[31] "Ecological regression analysis" shows the relationship between the ethnic composition of voting precincts and voting behavior—or, to put it differently, which candidate receives how many votes from each race or ethnic group. See *Overton* v. City of Austin, 871 F.2d 529, 539 (5th Cir.1989). "Extreme case or homogeneous precinct analysis" focuses on precincts in which almost all of the voting age population belong to one ethnic group. Under this type of analysis, if the race or ethnicity of a voter predicts voting behavior, then election results in predominately minority precincts should differ from results in predominately white precincts.

The State Defendants, Judge Wood, and Judge Entz raise various, across-the- board challenges to the methodology used by the Plaintiffs and accepted by the district court. They first attack the Plaintiff's reliance on 1980 Census figures to establish the *Gingles* factors. They also challenge the Plaintiffs' selection of elections. Finally, they complain about the Plaintiffs' use of bivariate regression analysis in establishing racially polarized voting.

With regard to the Plaintiffs' use of population statistics from the 1980 Census, the complaint is that the statistics are dated. Quoting this court's decision in *Houston v. Haley*, 859 F.2d 341, 345 (5th Cir.1988), vacated on other grounds, 869 F.2d 807 (5th Cir.1989), Judge Entz argues that "[w]hatever the voting age population composition was [in 1980], given mobility, mortality, and coming of age, we cannot tell with any certainty what it is today." Thus, Judge Entz concludes that the Plaintiffs failed to carry their burden of proof with regard to the *Gingles* factors, and that, therefore, the district court erred in relying on their statistical analyses. We disagree.

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[31]Both of these types of analyses are essentially forms of "bivariate regression analysis"—meaning that they correlate the race of voters and the level of support given to a particular candidate without considering other variables that might explain voters' choices.

After examining the record and Fifth Circuit law on this issue, we conclude that the complaint about the Plaintiffs' use of outdated statistical data is without merit. In *Overton*, we recognized that "absolute perfection of the base statistical data is not to be expected." 871 F.2d at 539. It is difficult for us to fault the Plaintiffs—and the district court—for relying on the most recent census figures in this case. Moreover, we note that in Dallas and Harris counties, the Plaintiffs relied on updated census figures. Judge Entz would apparently require minority groups seeking relief under Section 2 to either bring their lawsuits within the first few years after census figures are released or engage in a costly re-estimation of population figures. Although we cautioned in *Overton* that "a trial court should not ignore the imperfections of the data used nor the limitations of the statistical analysis," *Id.*, we do not think the trial court ignored the imperfections in the data set relied on by the Plaintiffs in Dallas County. Instead, the district court, after carefully considering those imperfections, accepted the data sets used by the Plaintiffs as being reliable. Accordingly, we conclude that the district court did not err in relying on the 1980 Census population data or on the analyses by the Plaintiffs' experts who also relied on this data.

The State Defendants, Judge Wood, and Judge Entz also complain about the principles by which the Plaintiffs' experts chose the relevant elections to be analyzed. They argue specifically that the Plaintiffs' experts should have considered more elections—elections pairing white candidates against white candidates, elections pairing white candidates against other minority candidates, primary elections, and non-judicial elections. Because the Plaintiffs' experts did not consider all of these types of elections, they conclude that the district court erred in relying on the Plaintiffs' analyses. Again, we disagree.

The State Defendants, Judge Wood, and Judge Entz essentially complain that, in the battle of the experts, their expert—Dr. Taebel—lost. Dr. Taebel analyzed the various types of elections described above, and the district court

considered his analyses in each of the counties at issue. We cannot fault the district court for giving more weight to the elections analyzed by the Plaintiffs' experts, especially given our recognition that "the evidence most probative of racially polarized voting must be drawn from elections including both [minority] and white candidates." *Westwego I*, 872 F.2d at 1208 n. 7. Accordingly, we reject the complaint that, as a matter of law, the elections the Plaintiffs chose to analyze are insufficient to establish the second and third *Gingles* factors as well as the existence of racially polarized voting.

Finally, Judge Wood argues that, to establish racially polarized voting, the Plaintiffs were required to conduct a multivariate analysis on the election results—an analysis that would consider variables other than the race of the voter, such as partisan affiliation of the candidate, whether the candidate was endorsed by the local bar poll, and campaign expenditures. We reject this argument. As we have already explained, see *supra* Part II.B.1.b. and note 7, to establish racially polarized voting, a Section 2 plaintiff need only demonstrate that whites and minorities vote differently. Thus, bivariate analyses such as the ones used by the Plaintiffs are sufficient.

In sum, we conclude that the statistical methods used by the Plaintiffs, although not perfect, are sufficient for purposes of establishing the *Gingles* factors and racially polarized voting. The Plaintiffs and the district court could reasonably rely on 1980 Census statistics. It was also reasonable for the district court to give more weight to the elections analyzed by the Plaintiffs. And finally, the Plaintiffs' were not required to use a multivariate analysis to demonstrate the existence of racially polarized voting.

2. *Review of District Court's Vote Dilution Findings*

In *Gingles*, the Supreme Court stated that "[t]he inquiry into the existence of vote dilution caused by submergence in a multimember district is district specific." 478 U.S. at 59 n. 28, 106 S.Ct. at 2771 n. 28. In a case like this, where a number of vote dilution claims are raised in one case, the district court must rely on data "specific to each individual

district" in making the appropriate findings under the *Gingles* threshold inquiry and the totality of circumstances inquiry. See *id.* The district court may not, according to the Court in *Gingles*, rely on data aggregated from all the challenged districts. *Id.*; see also *id.* at 101, 106 S.Ct. at 2793 (O'Connor, J., concurring) (voting statistics from one district are ordinarily irrelevant in assessing the totality of circumstances in another).

Because the Plaintiffs challenge Texas method of electing judges, as that method operates in nine target counties, we review the district court's findings on a county-by-county basis. That is, with regard to each of the nine target counties—Bexar County, Dallas County, Ector County, Harris County, Jefferson County, Lubbock County, Midland County, Tarrant County, and Travis County—we review the district court's specific findings under the *Gingles* inquiry, the totality of circumstances inquiry[32] and the ultimate vote dilution inquiry[33] for clear error.

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[32]We do not separately address two of the district court's findings under the totality of circumstances inquiry. First, with respect to the responsiveness of district judges in the target counties, the district court found nothing in the record "to suggest a lack of responsiveness ... to the particularized needs of members of the minority community." This finding is not challenged on appeal and we do not address it further. Second, we do not address the tenuousness of the state interests, having already done so in Part II.D. *supra* and having agreed with the district court's assessment.

[33]With respect to the ultimate vote dilution inquiry, we assume, for purposes of this part of the opinion, that the district court's ultimate vote dilution finding is protected by the clearly erroneous rule. We consider separately, in Part IV.B.3 infra, whether the district court's refusal to consider evidence of partisan voting patterns renders erroneous its ultimate vote dilution findings in the seven counties for which such evidence was offered. We also consider separately, in Part IV.C. infra, whether the proposed balancing framework that may have been indicated by the Supreme

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a. *Bexar County*

In Bexar County, where nineteen (19) state district court judges are elected in county-wide elections, Plaintiffs proceed only on behalf of Hispanic voters. At trial, the district court found that Plaintiffs had introduced evidence sufficient to establish all three *Gingles* factors and five of the factors listed as relevant in the totality of circumstances inquiry. Based on this evidence, the district court found that Texas' method of electing district judges dilutes Hispanic voting strength in Bexar. For the following reasons, we conclude that none of the district court's findings with regard to Bexar County is clearly erroneous.[34]

(i) *Gingles factors.* With regard to the first *Gingles* factor, the district court found that, as a group, Hispanic voters in Bexar County are sufficiently large and geographically compact to constitute a majority in a single member district. In making this finding, the district court relied on evidence introduced by the Plaintiffs indicating that (a) Hispanics constitute 41.1% of the voting age population in Bexar County, (b) Hispanics primarily reside in the

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[33](...continued)
Court in Houston Lawyers' Association, see *supra* Part II, would affect the district court's ultimate vote dilution findings in the target counties.

[34]Before addressing the district court's vote dilution findings in Bexar County, we consider the district court's refusal to allow certain Bexar County district judges to intervene after trial. On appeal, these Bexar County district judges argue that the district court erred in denying their post-trial motion to intervene under Rule 24 of the Federal Rules of Civil Procedure. We disagree. A motion to intervene under Rule 24(a) (intervention as of right) or under Rule 24(b) (permissive intervention) must be timely. See *Jones v. Caddo Parish School Bd.*, 735 F.2d 923, 926 (5th Cir.1984) (en banc). Although the district court did not expressly state, in denying the Bexar County district judges' motion to intervene, that their motion was untimely, it was well within the district court's discretion to deny the motion on this ground.

central and south central sections of Bexar County, and (c) it would be possible to create eight single-member districts in which voting-age Hispanics constitute majorities. Because the district court correctly based its determination on the voting age population in Bexar County, see *supra* Part II.A.1., and because its determination is plausible in light of the record, we conclude that its finding with regard to the first *Gingles* factor is not clearly erroneous.

The district court also found, under the legal standards required to establish the second *Gingles* factor, see *supra* Part II.A.2., that Hispanic voters in Bexar County are politically cohesive. In reaching this finding, the district court primarily relied on Dr. Brischetto's statistical analysis of six district court elections in which Hispanic candidates opposed white candidates. This analysis indicated that, in Bexar County, Hispanic voters gave 73% to 93% of their votes to the same candidate. The district court also relied on a bivariate regression analysis performed by Dr. Brischetto, an analysis that demonstrated a "strong relationship between race and voting patterns in Bexar County." In view of this evidence, we are not "left with a definite and firm conviction" that the district court was mistaken in finding that Hispanic voters in Bexar County are politically cohesive. Thus, this finding may not be set aside as clearly erroneous.

As for the third *Gingles* factor, the district court determined, after considering all the testimony offered by the Plaintiffs and the State Defendants, that there is legally significant white bloc voting in Bexar County. The district court first considered Dr. Brischetto's statistical analysis of the six general elections in which Hispanic district court candidates opposed white candidates. This data indicated that the preferred candidate of Hispanic voters won only once and that the non-Hispanic support for the Hispanic-preferred candidate ranged from 18% to 35% in

those six elections.[35] The district court also considered statistical evidence offered by Dr. Taebel, the State Defendants' expert, who analyzed twelve general elections, only one of which was a district court election, and eighteen primary elections. Dr. Taebel found that the Hispanic-preferred candidate won three of twelve general elections and six of eighteen primary elections. Finally, the district court considered testimony from Hispanic judicial candidates who attributed their losses to the lack of adequate support from white voters. Given the evidence presented to the district court, we cannot say that it clearly erred in finding persuasive Dr. Brischetto's conclusion that the white bloc vote in Bexar county is sufficiently strong to usually defeat the Hispanic community's preferred candidate.

(ii) *Totality of circumstances factors.* Inquiring into the totality of the circumstances in Bexar County, the district court found: that Hispanics had been subject to a history of discrimination in voting, that elections in Bexar County were characterized by racially polarized voting, that several aspects Texas' method of electing district judges enhance the opportunity for discrimination in Bexar County, that Hispanics in Bexar County continue to bear the socioeconomic effects of past discrimination, and that Hispanics in Bexar County have not been successful in district court elections. The district court found, however, no evidence of a slating process and no use of racial appeals in Bexar County elections. None of these findings is clearly erroneous.

The district court effectively took judicial notice of the history of official discrimination against Hispanics and Blacks in Texas, finding that this history was "either well

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[35]The State Defendants contend that the district court did not specifically assess the impact of white cross-over voting. The district court's memorandum opinion refutes this contention. The district court expressly considered the extent of white cross-over voting in Bexar County, as well as in all the remaining counties. Thus, the State Defendants' contention is without merit.

chronicled or undisputed." This history of official discrimination, the district court continued, "touched many aspects of the lives of minorities in [the nine target counties,] including *their access to and participation in the democratic system governing this State....*" (emphasis added). Neither the State Defendants nor the intervenors challenge this finding on appeal. Indeed, the State Defendants acknowledge the "long, shameful history of racial discrimination in Texas." Given this admission, we cannot conclude that the district court clearly erred in finding a history of discrimination touching the rights of Hispanics to participate in the Bexar County political process. See also *Graves v. Barnes*, 343 F.Supp. 704, 728 (W.D.Tex.) (three-judge court) (noting that "the Mexican-American population of Texas ... has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others"), *aff'd sub nom. Archer v. Smith*, 409 U.S. 808, 93 S.Ct. 62, 34 L.Ed.2d 68 (1972), *aff'd in part and rev'd in part sub nom. White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) (*Graves I*).

The district court also found strong evidence of racially polarized voting in Bexar County. Dr. Brischetto's statistical analysis of six district court elections from 1980 to 1988 revealed that, in all but one of the races, as the percentage of Hispanic voters in a precinct increased, support for the Hispanic preferred candidate also increased. According to Dr. Brischetto's statistical analysis, race explains 64% to 77% of the variance in voting in these six elections. The district court further observed that, in twenty-eight of the twenty-nine judicial elections involving Hispanic candidates in Bexar County, whites and Hispanics voted differently. Because the record supports the district court's finding of a strong relationship between race and voting patterns in Bexar County, we will not set that finding aside as being clearly erroneous.

Surveying the other factors relevant to the political

landscape in Bexar County, the district court found that certain features of Texas' scheme of electing district court judges interact with the at-large nature of that election scheme to further enhance the opportunity for discrimination in Bexar County. In particular, the district court found that the large size of Bexar County, the majority vote requirements in primary elections, and the use of what amounts to a numbered-post system in the county contribute to the dilution of minority voting strength. The potential of such features to dilute minority voting strength being well known, *see supra* Part II.B.1.c., we will not disturb the district court's finding with respect to this factor.

The district court further found that the Hispanic population in Bexar County—as well as minorities throughout Texas—continue to bear the effects of past discrimination in such areas as education and employment. This finding is amply supported by evidence introduced at trial: Over 73% of Bexar County's Hispanic families have a yearly income below $20,000, while approximately 44% of Bexar County's white families have a yearly income below that level. Some 24.3% of Hispanic families in Bexar County—compared to 5.4% of white families in that county—live below the poverty line. Moreover, only 5.2% of Bexar County Hispanics over the age of 25 are college graduates, while 24.9% of whites in Bexar County hold college degrees. And, only 11.8% of those in Bexar County's Hispanic work force hold managerial or professional positions, while 31.7% of those in Bexar County's white work force hold such positions. *See* Appendix IV. There is also evidence in the record indicating that (a) Hispanics in Bexar County register to vote at a substantially lower rate than members of other ethnic or racial groups, and (b) Hispanics, who constitute only 11.7% of Bexar County lawyers, are underrepresented in the pool of qualified district court candidates. Finally, the district court's finding is supported by decisions from this court acknowledging the lingering effects of discrimination on Hispanics in Texas. *See e.g., Campos v. City of Baytown*, 840

F.2d at 1249-50; *United States v. Texas Educ. Agency*, 564 F.2d 162, 174 (5th Cir.1977), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979). We therefore conclude that the district court did not clearly err in finding that Hispanics in Bexar County continue to bear the socioeconomic effects of past discrimination.

In considering the extent to which Hispanics have been elected to office in Bexar County, the district court determined that Hispanic district court candidates are not very successful. This finding is plausible in light of the record, and therefore, it is not clearly erroneous. The record reveals that from 1981 to 1989, while only 15.8% to 31.6% of the district judges sitting in Bexar County were Hispanics, Hispanics constituted some 46.61% of the total population in Bexar County. The record also reveals that Hispanics running for state district court judgeships won only one of six elections. Finally, the district court noted that, in the 1988 Republican primary for the 150th District Court, Arellano—an appointed Hispanic incumbent—was defeated by White, an Anglo candidate who had withdrawn from the primary and endorsed Arellano.

The State Defendants argue that "Hispanic judicial candidates in Bexar County have been very successful." They point specifically to the fact that, at the time of trial, there were five Hispanic district court judges in Bexar County. The problem with relying solely on the number of district court judges who are Hispanic, at least according to the Plaintiff's expert Dr. Brischetto, is that it does not give a "complete" picture of what happens to a Hispanic candidate who runs against a white candidate. Several of the Hispanic judges that the State Defendants' point to, according to Dr. Brischetto, got their position without having to run in a contested election. Faced with this conflicting evidence, the district court was warranted in finding that Hispanics running for state district court judgeships in Bexar

County are not very successful.[36]

With regard to the remaining totality of circumstances factors listed in the Senate Report, the district court found: no evidence of a slating organization in Bexar County or of overt or subtle racial appeals in Bexar County political campaigns. We conclude that these findings, which are not challenged, are not clearly erroneous.

(iii) *Ultimate vote dilution finding.* Based on these subsidiary findings, the district court found that, under the totality of the circumstances, Texas' current method of electing district judges operates in Bexar County to dilute the voting strength of Hispanic voters. This finding was based on a number of political and social realities in Bexar County, which together provide strong evidence that Hispanic voters in Bexar County currently have an unequal opportunity to participate in district court elections on account of their ethnic origin. Assuming the district court's ultimate vote dilution finding in Bexar County was based on the correct legal standards, *see infra* Parts IV.B.3. and IV.C., we conclude that the finding is not clearly erroneous.

b. *Dallas County*

Plaintiffs proceed on behalf of Black voters in Dallas County, where, at the time of trial, thirty-six (36) state district judges were chosen in county-wide elections.[37] As with Bexar County, the district court found that the Plaintiffs satisfied all three factors of the *Gingles* threshold inquiry. The district court also determined that the Plaintiffs had sufficiently demonstrated six of the totality of circumstances factors listed in the Senate Report. The district court finally determined, based on the totality of circumstances, that the

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[36]As discussed above, see *supra* Part II.B.1.g., the relevance of the number of Hispanic lawyers in Bexar County is doubtful—especially given the extent to which Hispanics in Bexar County continue to bear the effects of discrimination in education.

[37]On September 1, 1989, the Texas Legislature created a thirty-seventh state district court in Dallas County.

Plaintiffs had demonstrated vote dilution in Dallas County. We conclude that the district court did not clearly err in making these findings.

(i) *Gingles factors*. With regard to the first *Gingles* factor, the district court determined that Blacks in Dallas County were sufficiently large and geographically compact to constitute a majority in seven single-member districts. This determination was based partly on evidence that, of the 1,106,757 Dallas County citizens of voting age, 16% are Black. This determination was further based on evidence that Blacks primarily reside in the central and south central sections of Dallas County. Because it is supported by the record, this determination is not clearly erroneous.

Moving to the second *Gingles* threshold factor, the district court found that Blacks in Dallas County are politically cohesive when voting for state district court judges. In making this finding, the district court primarily relied on a regression analysis performed by Dr. Engstrom, an expert employed by the Plaintiffs. The regression analysis of seven Dallas County district court elections involving a Black candidate indicated that "Blacks consistently gave more than 97% of their vote to their preferred candidate." Dr. Engstrom's statistical analysis was confirmed by Dr. Wiser, another expert employed by the Plaintiffs, who concluded that 98% of the vote in homogeneous Black precincts and 83% of the vote in precincts with a Black population of 50% to 90% went to the Black-preferred candidate. The district court correctly applied the legal standards for determining political cohesiveness, see *supra* Part II.A.2., and its finding that Black voters in Dallas County are politically cohesive is plausible in light of the record. Accordingly, the finding does not constitute clear error.

With regard to the third *Gingles* factor, the district court found, on the basis of the exhibits and testimony of Dr. Engstrom and Dr. Wiser, that the "white bloc vote in Dallas County is sufficiently strong to generally defeat the choice of the Black community." In the seven elections studied by Dr.

Engstrom and Dr. Wiser—elections in which a Black district court candidate opposed a white district court candidate—some 61% to 71% of white voters in Dallas County voted against the candidate preferred by Black voters. Significantly, in five of the seven elections, the candidate preferred by Black voters was defeated. The highest percentage of white cross-over voting for the Black-preferred candidate was approximately 39%. Based on this evidence we are not left with a "definite and firm conviction" that the district court was mistaken in finding legally significant white bloc voting in Dallas County district judge elections.

(ii) *Totality of circumstances factors.* In analyzing the totality of the circumstances in Dallas County, the district court found: a history of official discrimination against Blacks in Dallas County; racially polarized voting; the use of voting practices that enhance the opportunity for discrimination against Blacks; lingering effects of past discrimination in the Black population of Dallas County; the use of racial appeals in Dallas County judicial elections; and a lack of success by Black district court candidates in Dallas County. The district court refused to find, however, that the Republican Party in Dallas County operated as a white-dominant slating group.

We find no clear error in the district court's first finding under the totality of circumstances inquiry—namely, that the history of official discrimination in Texas "touched many aspects of the life of minorities ... including their access to and participation in the democratic system governing this State." The district court correctly recognized that the history of racial discrimination against Blacks in Texas is "either well chronicled or undisputed."[38] Moreover, cases

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[38]The following examples of official discrimination against Blacks in Texas were cited by the court in *Graves I*, 343 F.Supp. at 725 n. 15, n. 16: a state statute prohibiting Blacks from participating in the

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decided in this circuit reveal that Dallas County shares Texas' history of discrimination. As recently as 1970, an organization calling itself the "Dallas Committee for Responsible Government" employed racial campaign tactics in white precincts to defeat the candidates supported by Black voters. See *Graves*, 343 F.Supp. at 726-27. And during the late 1950's, not one member of the Dallas County delegation voted against certain segregation measures introduced in the Texas House of Representatives. *Id.* Thus, we think the district court was warranted in taking judicial notice of the fact that Blacks in Dallas County historically have been the victims of official discrimination.[39]

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[38](...continued)
Democratic primary; a city ordinance segregating parks; a city ordinance making it unlawful for whites and Blacks to have sexual intercourse within the city limits; a statute prohibiting the adoption of white children by Blacks and Black children by whites; a criminal statute prohibiting fights or wrestling matches between whites and Blacks; and a Texas appellate court decision holding that the plaintiff stated a valid cause of action by alleging that his wife was wrongfully excluded from a passenger elevator set aside for whites and made to ride an elevator set aside for the use of Blacks.

[39]On appeal, Judge Entz concedes that Dallas County and Texas "once had official discrimination against the voting rights of [B]lack voters." He seeks to minimize this past reality of the Dallas County political landscape, however, by noting that the days of official discrimination are "thankfully long in the past." Judge Entz also suggests that the district court did not find that the unfortunate history of official discrimination has any present day lingering effect on the ability of Blacks to participate in the political process in Dallas County. Finally, Judge Entz points out that "there are certainly no present official impediments to [B]lack voting." We reject Judge Entz's invitation to discount the history of official discrimination against Blacks in Dallas County. First, we think that Judge Entz overstates the remoteness of this official discrimination. The year 1970 is not, in our view, "long in the past." Moreover, we disagree
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The district court also determined, based on Dr. Engstrom's homogeneous precinct and ecological regression analyses, that there is "a strong relationship between race and voting patterns in Dallas County." According to Dr. Engstrom's analyses, race explains at least 75% of the variance in voting in at least six of the seven elections studied. The State Defendants and Judge Entz do not dispute that voters in Dallas County vote along racial lines. Rather, they argue that the raw statistics do not explain why Dallas County voters vote along racial lines. Having refused the invitation to redefine the concept of racially polarized voting by including a causation requirement, see *supra* note 7, we conclude that the district court correctly found that racially polarized voting exists in Dallas County.[40]

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[39](...continued)
with Judge Entz's reading of the district court's opinion with respect to the effects of official discrimination. The district court expressly found that "the effect of past discrimination against Blacks ... is either well- chronicled or undisputed," thereby recognizing that past discrimination continues to hinder Blacks' ability to participate in the political process. Lastly, we note that Judge Entz's observation that there are no longer any official impediments to Black voting is beside the point. In amending Section 2, Congress indicated that it was concerned not only with overt prohibitions against casting a ballot, but also with the use of schemes that cancel out or minimize minority voting strength. See S.REP. at 6, 1982 U.S.C.C.A.N. at 182.

[40]Contrary to Judge Entz's suggestion, the district court did not reject this court's test for racially polarized voting. As we have already explained, see *supra* Part II.B.1.b., the concept of racially polarized voting does not denote the tendency of citizens to vote for candidates of their own race. Rather, racially polarized voting denotes the tendency of whites and minorities to vote differently. Although the district court, at one point in its memorandum opinion, referred to a Fifth Circuit decision defining racially polarized voting as the tendency of a group to vote for candidates of a particular race, the district court also noted, at the same point in the opinion, that under *Gingles*, racially polarized voting exists when whites and
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As with Bexar County, the district court found that certain features of Dallas County district court elections—namely, the use of large election districts, majority vote requirements in primary elections, and the use of a numbered-post system—enhance the possibility of vote dilution. Judge Entz challenges the district court's finding with regard to enhancement features, arguing (a) that Dallas County is not an unusually large election district, (b) that post- primary elections do not have a majority vote requirement, and (c) that, although a judicial candidate must run for a specifically numbered court, this requirement "is a reflection of the autonomy of the each court and its status in the true sense of the term as a single member judicial district." These challenges are without merit. First, with regard to the size of Dallas County, we note that district judges elected in Dallas County, with a population of 1.5 million, have a larger constituency than sixteen governors and thirty-two United States senators. Second, although we can agree that the district court did not find a majority vote requirement in post-primary elections, we must take into account the district court's finding of a majority vote requirement in primary elections. Contrary to Judge Entz's suggestion, the absence of a majority vote requirement in general elections does not remove the dilutive potential of such a requirement in primary elections. See *supra* Part II.B.1.c. Third, the justification offered for the existence of a numbered post system in Dallas County undercuts neither the existence of such a system nor its potential to dilute. See *id.* Because the district court's finding of enhancement features in Dallas County is amply supported by the record, it is not clearly erroneous.

The district court further found that Blacks in Dallas

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minorities vote differently. Moreover, in its county-by-county analysis, the district court clearly applied the correct legal standard in determining the existence and extent of racially polarized voting.

County continue to bear the effects of discrimination in education and employment. The district court specifically stated that "[t]he effect of past discrimination against Blacks and Hispanics in areas such as education, employment and health in most of the Counties in question is either well chronicled or undisputed." With respect to Dallas County, this finding was plausible in light of the record. As the statistics in Appendix IV demonstrate, Blacks in Dallas County lag unreasonably behind whites in terms of income, education, and professional status. Conversely, Blacks are disproportionately represented among those who live below the poverty line: 21.2% of Black families in Dallas County, while only 3.9% of white families, live below the poverty line. Moreover, the record reveals that, while Blacks constitute some 16% of Dallas County's voting age population, Black lawyers make up at most 2.2% of the lawyers residing in Dallas County. On the basis of this uncontroverted evidence, we conclude that the district court did not clearly err in finding that racial discrimination continues to affect the lives of Blacks in Dallas County.[41]

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[41]Judge Higginbotham suggests in his dissent that the history and lingering effects of discrimination against Blacks and Hispanics are entitled to no weight in the totality of circumstances analysis in any of the counties, because there was no evidence—other than evidence of low voter registration rates among Hispanics—of depressed political participation by those minority groups in the political process. Dissenting Op. at [389a]. Thus, he implies that depressed political participation may only be shown by low voter registration or low voter turnout rates.

Initially, we note that the district court, in addition to finding that Blacks and Hispanics continue to bear the effects of discrimination in education and employment, specifically found that "the continual effects of historical discrimination hinder[ ] the ability of minorities to participate in the political process."

We also note that this is not an issue that has been seriously pursued by the parties on appeal. The State Defendants do not raise this issue at all. Judge Entz devotes two sentences in each of his

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briefs to the argument that, insofar as Dallas County is concerned, the Plaintiffs offered "no testimony showing that, at this date, [Blacks'] lower [socioeconomic] status is directly a result of prior discrimination or that it hinders the ability of blacks to participate in the political process." Judge Entz candidly concedes in a footnote that "Dr. Brischetto offered such testimony with respect to other counties." Judge Wood devotes a fragment of one sentence to this issue on appeal, arguing only that the Plaintiffs produced "no evidence that lingering effects of discrimination hinder the ability of blacks to participate effectively in the political process in Harris County."

In addition, we note that, to the extent that the issue has even been raised with respect to Dallas and Harris counties, it is without merit. While evidence of depressed voter registration or turnout rates is one indicator of depressed political participation, it is by no means the only indicator. To say that there is no evidence in the record that "the level of black participation in politics is depressed," is to ignore the evidence repeatedly emphasized by Judge Entz, Judge Woods, and Judge Higginbotham with respect to the paucity of minority lawyers in each of the counties at issue. Before minorities can fully participate in district court elections, they must be qualified to run for such offices. And, to be qualified to run for a district court position, minorities must attend and graduate from law school, a privilege which was not equally accorded to Blacks and Hispanics in Texas until at least 1950. *See Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950). Thus, we conclude that the evidence indicating that Blacks constitute, at most, 2.2% of the lawyers in Dallas County and 3.8% of the lawyers in Harris County, when viewed in conjunction with the district court's finding that the paucity of minority lawyers is "due in part to historical discrimination," supports the district court's conclusion about "depressed political participation" by Blacks.

The district court's conclusion that the lingering effects of discrimination continue to hinder minority participation in the political process is further supported by Dr. Brischetto's expert testimony. Dr. Brischetto specifically testified with respect to all counties in which minorities continue to suffer the lingering socioeconomic effects of discrimination:

Well, certainly having less of these socioeconomic resources or

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The district court also found—significantly—that in two recent Dallas County elections, white candidates made racial appeals. In a 1986 district attorney election between John Vance, a white candidate, and Royce West, a Black candidate, Mr. Vance inserted a picture of his Black opponent in campaign advertisements. In the 1988 Republican district court primary between Larry Baraka, a Black candidate, and Brook Busby, a white candidate, Ms. Busby was less subtle. She distributed campaign literature that referred to Mr. Baraka as a "Black Muslim."

Judge Entz challenges the district court's finding of racial appeals in Dallas County as being clearly erroneous. Judge Entz argues specifically that judicial elections in Dallas County "were not characterized by overt or subtle racial

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characteristics to draw on, we find that minority voters will participate less in the election system. Education is an important resource. For example, it enables people to feel like they are more a part of and take part in the election system to a greater extent. Lacking that they participate less. So it is important, it has an effect certainly on their participation when they are subordinate status in the stratification system.

Finally, there is also evidence suggesting that, because of the lingering socioeconomic effects of discrimination, Blacks and Hispanics are unable to successfully mount a county-wide campaign. Several witnesses expressed their concern that minority candidates, because they generally do not have the financial resources to mount a county-wide campaign, are hindered in their ability to fully participate in the current system of electing judges. In Harris County, for example, Bonnie Fitch stated that Black district court candidates usually find it harder to raise money. This concern was echoed by Adam Serrata in Bexar County. He stated that "Anglos generally can raise more money than minority candidates but it is not as expens[ive] to run in a single member district election as it is in a countywide election." Jim Coronado also testified that the problem minorities have in mounting a successful, county-wide district court campaign arises from the facts that "[i]t costs a bunch of money" to mount such a campaign and that minority candidates generally "don't have the financial resources to get out there and do that."

appeals" and that "the only incident the trial court found to be a racial appeal in a judicial race was actually a reference to the candidate's religion." We disagree. The district court did not clearly err in finding that Ms. Busby's reference to her opponent as a "Black Muslim" constituted more than a reference to Mr. Baraka's religion.[42] The district court's finding with respect to Mr. Vance's campaign literature is also supported by the record. The district court determined that Vance's campaign literature sought to identify his opponent by race only after hearing testimony and reviewing the evidence in question. In view of this evidence, we will not set aside as clearly erroneous the district court's finding that Dallas County judicial elections have been tainted by racial appeals.

As for the success of Black candidates in Dallas County, the district court was confronted with conflicting evidence. At the time of trial Black district court candidates had opposed white district court candidates only seven times in Dallas County general elections, and the Black candidate won two of the seven elections. In both of those elections, however, the Black candidate was not the candidate *preferred*

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[42]The dissent, like Judge Entz, attempts to minimize this racial appeal by pointing out that it did not work for Ms. Busby, who lost the race to Mr. Baraka. Dissenting Op. at [379a]. While we recognize that the racial appeal was perhaps unsuccessful in this case, it nonetheless constitutes "some evidence" that racial politics are at work in Dallas County judicial elections. Moreover, the Senate Report does not instruct courts to consider whether candidates have won by using racial campaign appeals. Instead, the Senate Report instructs courts to consider "whether political campaigns have been characterized by overt or subtle racial appeals." S.REP. at 29, 1982 U.S.C.C.A.N. at 206. Finally, although we hold that the district court correctly considered this racial appeal in the totality of the circumstances in Dallas County judicial elections, neither the district court nor this court would have been willing—contrary to the dissent's disingenuous suggestion otherwise—to change the structure of all of Dallas County courts based solely on one racial campaign appeal.

by Blacks. The record also reveals that, from 1980 to 1989, the percentage of Black judges in Dallas County ranged from 0.0% to 8.3%; by contrast, Blacks constituted 18.5% of Dallas County's total population during this time period. Faced with this conflicting evidence about the success of Black district court candidates in Dallas County, the district court found Black candidates to be relatively unsuccessful.

Judge Entz challenges the district court's finding with respect to the success of Black candidates in Dallas County on two grounds. First, he argues that the baseline for determining minority candidate success is not the total minority population, but the number of minority lawyers in the county. He also contends that the district court should have considered the success of Black candidates in primary elections. We reject both of these challenges and hold that the district court's finding on this totality of circumstances factor is not clearly erroneous.

We have already explained our serious reservations about gauging minority electoral success under the qualified applicant pool approach. See *supra* Part II.B.1.g. Such an approach would, in our view, "allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress sought to remove." *Id.* (quoting *Westwego I*, 872 F.2d at 1209). Moreover, the district court correctly recognized that, "even if there is some relationship between the low number of minority judges and the number of eligible minority lawyers, that fact does not explain why well- qualified eligible minority lawyers lose judicial elections." Accordingly, we conclude that the district court correctly refused to compare the proportion of Blacks on the Dallas County district court bench with the proportion of Black lawyers in the county.

Judge Entz's contention that the district court should have considered the success of Black candidates in primary elections is similarly without merit. The Senate Report instructs courts to consider "the extent to which members of the minority group have been *elected to public office in the jurisdiction.*" S.REP. at 29, 1982 U.S.C.C.A.N. at 207

(emphasis added). The report does not instruct courts to consider the extent to which members of the minority group have won *primary* elections. Thus, while it may be true that, in the nine contested primary and general district court elections with Black candidates, the Black candidate won four of those elections, this is not the success rate with which Section 2 is concerned. Rather, under Section 2 it is significant that (a) no Black district court candidate who has received any measurable support from the Black community has ever been elected in Dallas County, and (b) Blacks are significantly underrepresented on the Dallas County district court bench in comparison to their proportion in the Dallas County population.

Therefore, the district court did not clearly err in finding that Black district court candidates have been relatively unsuccessful in Dallas County. As we have explained, see *supra* Part II.B.1.g., in considering the success of minority candidates, courts should make a relative, cautious inquiry. Moreover, the election of a few minority candidates, which is all that has been demonstrated in Dallas County, should not be allowed to foreclose a vote dilution claim. See *Id.*

With regard to the other totality of circumstances factors, the district court rejected testimony offered by the Plaintiffs depicting the Republican Party in Dallas County as a white-dominant slating group. The Plaintiffs do not challenge this finding on appeal.

(iii) *Ultimate vote dilution finding.* Based on these findings, the district court concluded that, under the totality of the circumstances, Texas' method of electing district court judges in Dallas county operates to dilute Black voting strength. The district court's vote dilution finding with regard to Dallas County is supported by strong evidence—evidence raising an inference that the at-large method of electing district judges in Dallas County interacts with the current and past racial climate and voting behavior, such that Blacks have an unequal opportunity to participate in Dallas County district court elections. The district court's ultimate vote dilution finding in Dallas County, if based on

the correct legal standards, *see infra* Parts IV.B.3. and IV.C., is not clearly erroneous.

c. *Ector County*

In Ector County, where the Plaintiffs proceed on behalf of Black and Hispanic voters combined, there are four (4) state district judges elected in county-wide elections. In accordance with the law of this circuit, *see Campos v. City of Baytown*, 840 F.2d at 1244 (allowing Blacks and Hispanics to proceed as one minority group under Section 2),[43] the

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[43]The impetus for two minority groups seeking to proceed as a coalition under Section 2 is apparently their inability, as separate groups, to overcome the first *Gingles* threshold factor. Thus, in locations where neither Blacks, by themselves, or Hispanics, by themselves, are sufficiently large and geographically compact to constitute a majority of the voting age population in a single-member district, Blacks and Hispanics combined may be able to satisfy this threshold requirement.

We recognize that the procedure of allowing Blacks and Hispanics to proceed as a "coalition" minority group in a Section 2 claim is fraught with risks. *See generally* Katharine I. Butler and Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 PAC.L.J. 619 (1990); Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups—When Is the Whole Greater Than the Sum of the Parts?*, 20 TEX.TECH.L.Rev. 95 (1989). First, there is a risk that members of one of the minority groups will increase their opportunity to participate in the political process at the expense of members of the other minority group. There is also the risk of running afoul of Congress' intent in amending Section 2. After all, "[t]he Voting Rights Act purpose was to eliminate *racial* discrimination—not to foster particular *political* coalitions." Butler & Murray, *supra*, at 648. In view of these risks, we note that minority groups should be allowed to proceed as a coalition under Section 2 only after the district court is satisfied that the risks we have discussed are not present in the community at issue.

On appeal, no party takes issue with the legitimacy of allowing Blacks and Hispanics to proceed as a coalition under Section 2. Nor

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district court found that Black and Hispanic voters combined satisfied the three *Gingles* factors. The district court further found that the Plaintiffs demonstrated five relevant factors under the totality of circumstances inquiry. Finally, the district court determined that Texas' method of electing district court judges operates to dilute Hispanic and Black voting strength in Ector County. As explained below, none of the district court's subsidiary findings with regard to Ector County is clearly erroneous.

(i) *Gingles factors.* The district court found that Hispanic and Black voters in Ector County were, as a group, sufficiently large and geographically compact to constitute a majority in one single member district. The district court in part based its finding on evidence that Ector County, with a total voting age population of 79,516, has a Black voting age population of 3,255 (4.1%) and a Hispanic voting age population of 14,147 (17.8%). The combined voting age population of Blacks and Hispanics in Ector County, according to evidence introduced at trial, is 17,402, or 21.9% of the total voting age population. The district court further relied on evidence indicating that, because minority residents in Ector County are concentrated in the southwest section of Ector County, it would be possible to draw one single-member district in which voting age minority residents constitute a majority. Such a single-member district could be created, the district court determined, even if non-citizen

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does any party argue that the interests of one minority group have been advanced at the expense of another. Instead, various parties level county-specific challenges to the district court's finding that Hispanics and Blacks are politically cohesive. We address such challenges, in the counties where they are made, in our discussion of the district court's finding of political cohesiveness. Finally, we note that no party asked the district court to make a finding that Blacks and Hispanics were politically cohesive in any county other than the three counties where the Plaintiffs proceeded on behalf of Blacks and Hispanics.

voting-age Hispanics are eliminated from the estimates of the voting age populations. Finally, the district court relied on the anecdotal testimony of Lawrence Barber, an attorney who has practiced law in Ector and Midland Counties for many years. Barber testified that, "[i]n Ector County, there are geographic or residential areas that are identifiably minority, in other words where most of the Blacks and Hispanics live." Because the district court's finding on this first *Gingles* factor is plausible in light of the record, we conclude that it is not clearly erroneous.

With regard to the second *Gingles* factor, the district court found that "Blacks and Hispanics are cohesive as a group in Ector County judicial elections." Because no Black or Hispanic has ever run for a district court seat in Ector County, the district court focused on the results of four exogenous judicial elections pairing Hispanic candidates against white candidates. A multiple regression analysis of these elections demonstrated that Blacks and Hispanics voted together. Moreover, in three of the four contests large majorities of Blacks and Hispanics voted together for the Hispanic candidate. The district court's finding of political cohesion, which is supported by the record, is not clearly erroneous.

The district court also determined that the white bloc vote in Ector County is legally significant. In all four of the appellate judicial elections pairing a Hispanic candidate against a white candidate, substantial majorities of whites voted against the Hispanic candidate. And in three of the four elections, the Hispanic candidate lost. The State Defendants' expert, Dr. Taebel, analyzed five general judicial elections that did not pair a white against a minority candidate. Minority and white voters voted differently in each of these elections, with the minority preferred candidate losing three times. Faced with this conflicting evidence, the district court gave more weight to the elections pitting minority candidates against white candidates. Because we have recognized that such elections are generally more probative in vote dilution cases, we will not set aside the

district court's finding of legally significant white bloc voting as clearly erroneous.

(ii) *Totality of circumstances factors.* The district court found that Plaintiffs had demonstrated several factors that are relevant to the totality of circumstances analysis: a history of discrimination against Blacks and Hispanics in Ector County; racially polarized voting in Ector County judicial elections; voting practices that enhance the opportunity for discrimination; lingering socioeconomic effects of past discrimination; and a lack of success by minority judicial candidates in Ector County. We address each of these findings in turn and conclude that none is clearly erroneous.

The district court found that Ector County shares Texas' history of discrimination against Blacks and Hispanics. The State Defendants—wisely—do not challenge this finding. As recently as 1982, Ector County was not only failing to dismantle its dual school system, but also was *intentionally increasing* the segregation of Black and Hispanic students from white students in its county-wide school district. *See United States v. CRUCIAL*, 722 F.2d 1182, 1184-85 (5th Cir.1983).

Relying on ecological regression and homogeneous precinct analyses performed by Dr. Brischetto on the four appellate judicial contests pairing a white and Hispanic candidate, the district court found a "strong relationship between race/ethnicity and voting patterns." According to Dr. Brischetto's analysis, there was a 78% correlation between race and voting patterns, with race explaining at least 61% of the variance in such patterns. This finding is further supported by the elections analyzed by Dr. Taebel. In the five general judicial elections that did not involve a white candidate running against a minority candidate, minorities and whites voted differently. The district court's finding of strong racially polarized voting is therefore plausible in light of the record.

The district court also found that Ector County's majority vote requirement in primaries and its requirement

that judges run for a designated post enhance the opportunity for discrimination against minorities. Because of the relatively small number of people in Ector County, however, the district court refused to find that Ector County used "unusually large election districts." These findings are not challenged on appeal, and we will not set them aside as being clearly erroneous.

The district court further considered the extent to which Blacks and Hispanics in Ector County bear the effects of discrimination in such areas as education, employment, and health. The evidence introduced by the Plaintiffs on this totality of circumstances factor is significant: Some 73% of Ector County's Black families and some 67.6% of Ector County's Hispanic families have a yearly income below $20,000. In comparison, only 40% of white families in Ector County have a yearly income level below $20,000. With regard to poverty line statistics, Plaintiffs introduced evidence showing that 30.6% of Black families and 18.3% of Hispanic families—as compared with 5.0% of white families—live below the poverty line. Only 6.1% of Blacks and 2.8% of Hispanics over the age of 25 in Ector County are college graduates. The comparable figure for whites in Ector County is 14.2%. Finally, only 10.6% of working Blacks and 6.9% of working Hispanics in Ector County hold managerial or professional positions, while 21.3% of working whites hold such positions. *See* Appendix IV. On the basis of this evidence, as well as evidence indicating that only six Black and Hispanic attorneys reside in Ector County, we conclude that the district court did not clearly err in finding that racial discrimination continues to affect the lives of minorities in Ector County, "including their access to and participation in the democratic system governing this State."

In analyzing the extent to which minority candidates have been elected to office in Ector County, the district court was again confronted with a sparsity of data. As noted above, no Black or Hispanic has ever run for a district court seat in Ector County. Nonetheless, the district court focused on the fact that, in the four other Ector County judicial elections

pairing Hispanic candidates against white candidates, the Hispanic candidate won only once. Given this evidence, the district court was warranted in finding that minority candidates in Ector County are relatively unsuccessful in running for judicial office.

Concerning the other totality of circumstances factors, the district court found no evidence of a white-dominated candidate slating process in Ector County and no evidence of overt or subtle appeals to race in Ector County judicial elections. Neither of these findings is clearly erroneous.

(iii) *Ultimate vote dilution finding.* Based on the evidence discussed above, the district court found that Texas' method of electing district judges operates in Ector County to dilute the voting strength of Blacks and Hispanics. This ultimate vote dilution finding is amply supported by the structural, behavioral, and racial, features of Ector County's political landscape. Assuming this finding was based on the appropriate legal standards, *see infra* Parts IV.B.3. and IV.C., we conclude that it is not clearly erroneous.

d. *Harris County*

Harris County, with a population of some 2,409,544, is the largest county involved in this lawsuit. With a voting age population of 1,685,024, Harris County elects fifty-nine (59) state district judges in county-wide elections. Proceeding on behalf of Black voters in the county, Plaintiffs offered evidence that, in the district court's view, was sufficient to satisfy the three *Gingles* factors. The district court also found, on the basis of the Plaintiffs' evidence, that five of the totality of circumstances factors are present in Harris County. After considering the totality of the circumstances surrounding Harris County district court elections, the district court found that the Plaintiffs had demonstrated vote dilution. For the following reasons, we conclude that the district court's findings with regard to Harris County are not clearly erroneous.

(i) *Gingles factors.* The district court first determined, in accordance with the proper legal standards, that Blacks in Harris County are sufficiently large and geographically

compact to constitute a majority in at least one single-member district. This finding was based on evidence that Blacks constitute 18.2% of Harris County's voting age population, that Blacks primarily reside in the north central, central, and south central sections of Harris County, and that nine single-member districts could be drawn in which Blacks constituted a majority of the voting age population. Because this finding is supported by the record, we conclude that it is not clearly erroneous.[44]

To establish the second and third *Gingles* factors, the Plaintiffs offered the testimony of Dr. Engstrom, who analyzed seventeen district court races between 1980 and 1988 pairing white and Black candidates. To determine the racial composition of the various precincts in Harris County, Dr. Engstrom used 1980 Census figures of total Black population by precinct for 1980 races. For his analysis of 1982, 1984, 1986, and 1988 election results, however, Dr. Engstrom used precinct voter registration estimates provided

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[44]Judge Wood challenges the district court's finding with regard to the first *Gingles* factor. In particular, she argues that it is mathematically impossible to draw nine single member districts (or 22% of the total number of districts in Harris County) in which voting age Blacks, who constitute only 18.2% of the voting age population, are a majority. The problem with Judge Wood's argument is that, to satisfy the first *Gingles* factor, the minority group must only demonstrate that "it is sufficiently large and geographically compact to constitute a majority in a single member district." 478 U.S. at 50, 106 S.Ct. at 2766 (emphasis added). Thus, as long as Blacks in Harris County are sufficiently large and geographically compact to constitute a majority in *at least one* single member district, the first *Gingles* factor is satisfied. Because Judge Wood does not dispute that Blacks could constitute a majority in at least one district in Harris County, the district court's finding with regard to this factor is not clearly erroneous.

by Dr. Richard Murray, a non-testifying expert.[45]

The district court, relying on Dr. Engstrom's statistical analysis and on anecdotal evidence, found that Blacks in Harris County are politically cohesive. Based on a statistical analysis of seventeen district court general elections in Harris County in which a Black candidate ran against a white candidate, Dr. Engstrom testified that, in sixteen of these seventeen elections, over 96% of Black voters cast ballots for the same candidates. The Plaintiffs also offered the testimony of Sheila Jackson Lee, a Black resident of Harris County for approximately eleven years. Based on her experience—and particularly her unsuccessful bids in judicial elections in Harris County—Lee testified that Blacks in Harris County are politically cohesive in judicial elections. The district court's finding that Blacks in Harris County are

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[45]Judge Wood attacks Dr. Engstrom's reliance on Dr. Murray's voter registration estimates. She points out that Dr. Murray did not authenticate the estimates and that Dr. Engstrom only performed a limited check on the estimates. Thus, she reasons, it was error for Dr. Engstrom and the district court to rely on Dr. Murray's voter registration estimates. We disagree. Judge Wood's argument is that, under Rule 703 of the Federal Rules of Evidence, the data relied on by Dr. Engstrom is not "of a type reasonably relied upon by experts" analyzing voting patterns. At trial, however, Dr. Engstrom testified that estimates of the ethnic makeup of precincts, such as the ones provided by Dr. Murray, are of a type customarily relied on by voting rights experts. Dr. Engstrom further testified that, when he did perform a limited check on the estimates provided by Dr. Murray, the data was reliable. The district court apparently credited Dr. Engstrom's testimony and found the data set used in his analysis of Harris County to be reliable. Moreover, the district court correctly noted that any imperfections in the estimates provided by Dr. Murray went to the weight of Dr. Engstrom's testimony and not to its admissibility. In any event, we hold that the district court did not abuse its discretion in allowing Dr. Engstrom to testify about his analysis of election results. We also hold that the district court did not clearly err in relying on Dr. Engstrom's testimony concerning the second and third *Gingles* factors.

politically cohesive is amply supported by the record, and accordingly, we will not disturb it on appeal.

As for the third *Gingles* threshold factor, the district court determined that "the white bloc vote in Harris County is sufficiently strong to generally defeat the choice of the Black community." In making this determination, the district court relied primarily on Dr. Engstrom's analysis of the seventeen district court elections in which Black candidates opposed white candidates. This analysis revealed that (a) in sixteen of the seventeen elections, between 61% and 71% of white voters voted against the candidate preferred by Black voters, and (b) in fifteen of the seventeen elections, the candidate preferred by Black voters was defeated. The district court also relied on testimony from several unsuccessful Black district court candidates, who attributed their losses to their inability to attract enough white support. Because the district court applied the correct legal standard for determining the existence of legally significant white bloc voting, and because its finding is plausible in light of the evidence before it, we conclude that its finding is not clearly erroneous.

Pointing to elections in which Hispanic judicial candidates defeated white candidates, the State Defendants argue that the district court's finding of legally significant white bloc voting is not plausible in light of the record. Citing our decision in *Campos v. City of Baytown*, they contend that, because Blacks and Hispanics are politically cohesive in Harris County judicial elections, the district court was required to specifically consider and give equal weight to elections pairing white and Hispanic candidates in determining whether white voters will usually defeat the preferred candidate of Black voters. The problem with their argument is that it was not properly raised before the district court and therefore is not properly before us on appeal. Their argument requires a fact finding that Blacks and Hispanics in Harris County are politically cohesive. Yet, neither the State Defendants nor Judge Wood proposed any such finding with respect to Harris County. Indeed, the

record in this case reveals that Judge Wood proposed a fact finding, one which was adopted by the State Defendants, that "Blacks and Hispanics together in Harris County *do not constitute a politically cohesive minority group*." (emphasis added). Thus, because the State Defendants failed to present their fact-based argument to the district court, we cannot fault the district court for refusing to specifically consider and give equal weight to elections pitting Hispanic judicial candidates against white judicial candidates in Harris County.

(ii) *Totality of circumstances factors.* Moving to the totality of the circumstances surrounding Harris County's political process, the district court first determined that Blacks in Harris County—like Blacks throughout Texas—were historically the victims of official discrimination that touched their rights to participate in the political process. Neither the State Defendants nor Judge Wood challenges this finding. Accordingly, we will not set it aside as clearly erroneous.

The district court also determined that Blacks and whites vote differently— which under the controlling law amounts to a finding of racially polarized voting. See *supra* Part II.B.1.b. This finding is amply supported by the Plaintiffs' evidence that, in sixteen of the seventeen races studied by Dr. Engstrom, over 96% of Black voters cast ballots for the same candidates, while between 61% and 71% of white voters voted against those same candidates. According to Dr. Engstrom's analysis of those elections, there was a 79% correlation between race and voting patterns, with race explaining 62% of the variance in such voting patterns. This finding is further supported by testimony from Dr. Taebel, the State Defendants' expert. Dr. Taebel studied twenty-three district court elections in which minorities opposed white candidates, and in all of these elections, Dr. Taebel testified, Blacks and whites voted differently. We conclude, based on this evidence, that the district court's finding of racially polarized voting is not clearly erroneous.

With regard to voting practices that enhance the

opportunity for discrimination against minorities, the district court found three such practices operated in Harris County: the use of a numbered-post system, the use of a majority vote requirement in primary elections, and the use of unusually large election districts. The size of Harris County is particularly relevant. The evidence shows that every judge in Harris County—with its population of nearly 2.5 million—has a larger constituency than twenty governors and forty United States Senators. Because the district court's finding of enhancement features is plausible in light of the record, we conclude that it is not clearly erroneous.

Contrary to Judge Wood's suggestion, the district court also found that the effects of Texas' history of severe racial discrimination are readily apparent in and continue to hinder Harris County's Black population. The district court expressly found that "[t]he effect of past discrimination against Blacks and Hispanics in areas such as education, employment and health in most of the Counties in question is either well chronicled or undisputed." This finding is amply supported by the evidence, which shows that some 62% of Black families in Harris County have a yearly income below $20,000, in comparison to 28.2% of white families. The evidence introduced at trial also reveals that 19.5% of Black families—as compared to 3.5% of white families—live below the poverty line in Harris County. In addition, only 11.7% of Harris County Blacks over the age of twenty-five are college graduates, while 28.0% of whites over the age of twenty-five have college degrees. The evidence at trial further demonstrates that, while 13.1% of the members in Harris County's Black work force hold managerial or professional positions, 30.4% of those in Harris County's white work force hold such positions. *See* Appendix IV. Finally, evidence introduced by the State Defendants indicates that Black lawyers, who make up at most 3.8% of the lawyers in Harris County, are significantly underrepresented in the pool of qualified district court candidates. On the basis of this uncontroverted evidence, we conclude that the district court did not clearly err in

finding that Harris County Blacks continue to bear the effects of racial discrimination in education and employment—effects which hinder their full participation in the political process.

In considering the extent to which Blacks have been elected to office in Harris County, the district court found that Black district court candidates had been relatively unsuccessful. The district court relied primarily on the low success rate of Black candidates in the seventeen elections in which Black district court candidates opposed white district court candidates. As noted above, the Black district court candidate only won two of these elections. The district court's finding is also supported by evidence demonstrating that, since 1981, Blacks have occupied—at most—three of the fifty-nine district court seats in Harris County (5.1%). By comparison, Blacks constitute 19.7% of Harris County's total population. Judge Wood challenges the district court's finding on three grounds.

First, pointing to the "qualified applicant pool" of Black lawyers in Harris County, Judge Wood maintains that Black candidates in Harris County have been successful. In particular, she notes that, while Blacks constitute only 3.8% of the lawyers qualified to run for state district judge in Harris County, Blacks constitute 5.1% of the district judges in Harris County. Thus, she argues that "Blacks are *overrepresented* on the bench, not *underrepresented*." We disagree. As discussed *supra* Part II.B.1.g., it would be perverse to measure the success of Black candidates by referring to the pool of Black lawyers, especially when the paucity of Black lawyers "is a likely result of a racially discriminatory system." (quoting *McMillan v. Escambia*, 748 F.2d at 1045). Accordingly, we hold that the district court correctly refused to measure minority candidate success in Harris County by referring to the qualified applicant pool of eligible Black lawyers.

Judge Wood also argues that, when uncontested elections involving Black candidates are taken into account, the success of minority candidates drastically improves. Since

1978, however, Judge Wood can point to only three uncontested races in which Black district court candidates prevailed. Given the low number of instances in which a Black candidate has been elected in an uncontested district court race, we cannot fault the district court for considering the success of minority candidates in the more likely scenario of a contested election. In any event, we cannot say that the three uncontested elections in Harris County involving Black candidates renders erroneous the district court's conclusion that, as a general rule, Blacks are unsuccessful in their attempts to be elected to district court judgeships.

Finally, Judge Wood challenges the district court's refusal to consider two elections from 1978 in which Black candidates won seats on the Harris County district court bench. We note that it is not at all clear that the district court refused to consider these races. In its memorandum opinion, the district court merely cites the fact that, since 1980, only two of seventeen Blacks running for district judge prevailed. Moreover, the district court could reasonably choose to rely on elections since 1980 for determining the success of Black candidates in Harris County.

Thus, we conclude that the district court did not clearly err in finding that Black district court candidates have been relatively unsuccessful. The district court relied on the appropriate measures of Black candidate success— namely, (a) the success rate of Black candidates when they run against white candidates, and (b) the ratio of Black district judges to total Black population. These measures indicated that Black district court candidates generally lost in contested elections and that Blacks are underrepresented on the Harris County district court bench. In view of this evidence, we are not left with the definite and firm conviction that the district court was mistaken in finding a lack of success by Black district court candidates in Harris County.

The district court found no evidence of any slating process and no evidence of racial appeals in Harris County

judicial elections. Neither of these findings is challenged on appeal as being clearly erroneous.

(iii) *Ultimate vote dilution finding.* Based on these subsidiary findings, the district court found that the total circumstances surrounding Harris County elections operate to dilute the voting strength of Blacks. Again, this finding is strongly supported by the evidence of racially polarized voting, the lack of success by Blacks running for district court seats, the history of discrimination against Blacks in Harris County, and the extent to which Blacks continue to suffer the effects of past discrimination. Again, the district court's finding, if based on the appropriate legal standards, *see infra* Parts IV.B.3. and IV.C., is not clearly erroneous.

e. *Jefferson County*

In Jefferson County, where (8) state district court judges are elected in county-wide elections, the Plaintiffs proceed only on behalf of Black voters. The district court found that Plaintiffs established each of the three *Gingles* threshold factors and five relevant factors under the totality of circumstances inquiry. The district court further found, on the basis of these factors, that Texas' method of electing district court judges operates to dilute Black voting strength in Jefferson County. We conclude that the district court's findings in Jefferson County, being amply supported by the record, are not clearly erroneous.

(i) *Gingles factors.* With regard to the first *Gingles* factor, the district court found that, as a group, Black voters in Jefferson County are sufficiently large and geographically compact to constitute a majority in at least one single member district. In making this finding, the district court relied on evidence indicating that (a) Blacks constitute 24.6% of the Jefferson County voting population, (b) Blacks primarily reside in the central and southeastern portions of Jefferson County, and (c) it would be possible to draw two single-member districts in which voting age Blacks constitute a majority. This finding is plausible in light of the entire record and, accordingly, we will not disturb it on appeal.

In considering the second and third *Gingles* factors, the district court was confronted with a sparsity of data. Because no Black candidate has ever run for district court judge in Jefferson County, the district court relied on the results of seven other judicial elections, occurring from 1972 to 1988, which pitted Black candidates against white candidates. In particular, the district court relied on: four Democratic primaries involving Justice of the Peace contests; one Democratic primary involving a county court at law post; and two Democratic judicial primary runoffs. The district court also considered results from the 1988 Democratic Presidential primary, in which Jesse Jackson was a candidate.

The State Defendants and, as amicus curiae, certain Jefferson County District Judges attack the district court's decision to rely on these elections. They argue that the electoral results reviewed by the district court were dated and that the district court should have given more weight to two legislative races in the 1980's, races in which Black candidates won. We disagree. When a district court is faced with a sparsity of data, it must remain flexible. See *Gretna*, 834 F.2d at 502 (citing *Gingles*, 478 U.S. at 57 n. 25, 106 S.Ct. at 2770 n. 25). Here, the district court decided that the results from the eight elections offered by the Plaintiffs—seven of which involved judicial elections—were more probative than the two legislative races relied on by the State Defendants. We cannot say that the district court clearly erred in considering results from judicial races to be more probative than the results from legislative races. Our conclusion is buttressed by the fact that the legislative races relied on by the State Defendants occurred in a district that (1) is not contiguous with Jefferson County, and (2) has a considerably higher percentage of Black voters than Jefferson County.

Based on the eight elections analyzed by the Plaintiffs' expert, the district court found that Black voters in Jefferson County are politically cohesive. In six of the eight elections, over 70% of Black voters chose the Black candidates; in

one election, 51% of Black voters chose the same candidate; and finally, in the other election relied on by the district court, there was a split in the Black vote between two Black candidates. Faced with conflicting evidence on the issue, the district court could reasonably determine that Black voters are politically cohesive in Jefferson County judicial elections. As an appellate court, we will not reweigh the evidence. Accordingly, we conclude that the district court did not clearly err in finding that Plaintiffs satisfied the second *Gingles* factor with respect to Jefferson County.

The district court also determined that, based on the seven *judicial* elections that were analyzed by the Plaintiffs' expert, there was legally significant white bloc voting in Jefferson County. In five of the seven judicial elections, the district court noted, Blacks and whites voted differently and the candidate preferred by Blacks lost—even though the Black- preferred candidate received 70% to 93% of the Black vote in those five elections. Because the district court's determination is plausible in light of the record, we conclude that it is not clearly erroneous.[46]

(ii) *Totality of circumstances factors.* As with the other counties involved in this case, the district court found that Jefferson County shares Texas' history of official discrimination against Blacks. The history of official discrimination against Blacks in Jefferson County was

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[46]In their amicus brief, certain Jefferson County district judges request this court to take judicial notice of the fact that, in 1990, a Black county court at law candidate won the Democratic primary, defeating two white opponents, as well as the general election, defeating another white opponent. We decline to do so. The record in a Voting Rights Act case must close at some point, and in our view, that point is the end of trial. Moreover, we discern no principled way in which to limit such a procedure in Voting Rights Act cases. If we were to take judicial notice of elections occurring after trial that tend to undermine a vote dilution claim, we would also be compelled to judicially notice elections that tend to support a vote dilution claim.

particularly "well chronicled" in *Graves v. Barnes*, 378 F.Supp. 640 (W.D.Tex.1974) (three-judge court), vacated sub nom. *White v. Regester*, 422 U.S. 935, 95 S.Ct. 2670, 45 L.Ed.2d 662 (1975) (Graves II). There, the three-member court found that twenty years after the Supreme Court's decision in *Brown v. Board of Education*,[47] the Beaumont Independent School District continued to bus Black children away from their neighborhood schools and across town to all- Black schools. *Id.* at 648. Given this history, the State Defendants do not challenge the district court's finding that Blacks in Jefferson County suffered from official discrimination and that this discrimination touched their rights to participate in the political process.

In considering the extent to which voting in Jefferson County is racially polarized, the district court focused on the eight elections described above. It found, based upon Dr. Brischetto's regression analysis, a "strong relationship between race and voting patterns in Jefferson County." This finding is supported by evidence that, in five of the seven judicial elections analyzed, Blacks and whites voted differently. It is further supported by Dr. Brischetto's calculation of a 66% to 97% correlation between race and voting patterns in the eight elections studied. Accordingly, the district court's finding of strong racially polarized voting is not clearly erroneous.

The district court also found that two features of the method of electing judges in Jefferson County enhanced the opportunity for racial discrimination against Blacks. The potentially dilutive effects of these features—namely, requiring candidates to run for a specifically numbered post and obtain a majority of votes in the primary elections—have already been established. See *supra* Part II.B.1.c. Thus, we will not set aside the district court's finding with regard to this totality of circumstances factor.

The district court further found that Blacks in Jefferson

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[47]347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

County continue to bear the effects of past discrimination in areas such as education and employment. The statistics introduced by the Plaintiffs and set forth in Appendix IV support this finding. Over 68% of Jefferson County's Black families have a yearly income below $20,000, while less than 27% of Jefferson County white families have an income below that level. In addition, 26.4% of Black families in Jefferson County—as compared to 4.0% of white families—live below the poverty line. With regard to education, only 6.2% of Jefferson County Blacks over the age of twenty-five have college degrees. In comparison, 16.2% of Jefferson County whites over the age of twenty-five have such degrees. Finally, only 13% of working Blacks in Jefferson County hold managerial or profession positions, while 30% of working whites hold such positions. On the basis of this uncontroverted evidence and evidence indicating that between 14 and 17 Black lawyers reside in Jefferson County, we conclude that the district court did not clearly err in finding that racial discrimination continues to affect the lives of Blacks in Jefferson County.

As to the success of minority candidates in Jefferson County, the district court found that they were relatively unsuccessful. This finding was based in part on evidence that, in the eight elections analyzed, the Black candidate lost in all but one. This finding is also supported by the fact that no Black candidate has ever been elected to a state district court in Jefferson County. In fact, no Black candidate has ever run for a district court judgeship in Jefferson County. According to testimony at trial, the reason Black lawyers do not run for seats on the district court bench is because of the high probability of defeat. Given this testimony and the evidence from other elections involving black judicial candidates, we cannot say that the district court clearly erred in finding that Blacks have been relatively unsuccessful in their attempts to get elected to judicial positions in Jefferson County.

With regard to the other factors that may be relevant to the totality of circumstances analysis, the district court found

no evidence of those factors. In particular, the district court determined that there was no evidence of a candidate slating process in Jefferson County and no evidence of racial campaign tactics. These findings are not challenged on appeal.

(iii) *Ultimate vote dilution finding.* Considering the total circumstances surrounding Jefferson County district court elections, the district court found that Texas' method of electing district judges operates in that county to dilute the voting strength of Blacks. This finding is strongly supported by evidence indicating that the at-large method of electing district judges in Jefferson County interacts with social and political factors, including the racial climate, to deny Blacks an equal opportunity to participate in the district court political process. Moreover, because the State Defendants introduced no evidence suggesting that partisan politics explain this unequal opportunity to participate, *see infra* Part IV.B.3., there is no argument that, under the accepted Section 2 framework, the district court applied an incorrect legal standard with respect to its ultimate vote dilution finding. We therefore hold that, unless the district court was required to balance state interests against proven vote dilution, its Section 2 liability finding in Jefferson County is not clearly erroneous.

f. *Lubbock County*

Plaintiffs proceed on behalf of Black and Hispanic voters combined in Lubbock County. The voters in Lubbock County currently elect five (5) state district judges in county-wide elections and one (1) additional state district judge in a bi-county election with the voters of Crosby County. The district court determined, after hearing evidence, that the Plaintiffs had satisfied the *Gingles* threshold factors and that five of the totality of circumstances were present in Lubbock County. The district court further determined, based on these factors, that Texas' method of electing district court judges operates to dilute Hispanic and Black voting strength in Lubbock County. After reviewing these findings, we conclude that none is

clearly erroneous.

(i) *Gingles factors.* The district court first found, under the correct legal standards, that Black and Hispanic voters in Lubbock County are sufficiently large and geographically compact to constitute a majority in at least one single-member district. In making this finding, the district court relied on evidence that: (a) Blacks and Hispanics combined constitute 21.6% of the voting age population of Lubbock County; (b) Blacks and Hispanics primarily reside in the northeastern, eastern, and southeastern sections of the Lubbock County area; and (c) it would be possible to create one single member district in which voting-age minorities constitute a majority. Because the district court's finding with regard to the first *Gingles* factor is plausible in light of the record, we will not set it aside as being clearly erroneous.

Because no local judicial contest involved a minority candidate opposing a white candidate, Plaintiffs' expert Dr. Brischetto relied on six exogenous appellate judicial contests to evaluate the political cohesiveness of Lubbock County's Blacks and Hispanics and the strength of the white bloc vote in Lubbock County. In particular, Dr. Brischetto analyzed two Texas Supreme Court general elections, two Democratic primary elections, and two Democratic primary runoffs. According to Dr. Brischetto, no local justice of the peace races were included in the analysis because the precincts for those races were not at least as large as a major city.

Based on the analysis conducted by Dr. Brischetto and on anecdotal evidence, the district court concluded that Hispanics and Blacks are politically cohesive in Lubbock County judicial races. Dr. Brischetto's analysis revealed that Blacks and Hispanics favored the same candidates in each of the elections analyzed and that those candidates received a clear majority of the combined Black and Hispanic vote. Testimony from Maria Luisa Mercado, a Hispanic attorney from Lubbock County, also supports the district court's finding. She testified that Blacks and Hispanics work together in the county on many significant issues. Because

the district court's finding of political cohesiveness is supported by the record, it is not clearly erroneous.

The State Defendants challenge the district court's finding of political cohesiveness in Lubbock County by pointing to evidence that, on several occasions, Black and Hispanic candidates opposed one another in Lubbock County races. The Supreme Court has made clear that Section 2 plaintiffs need not prove absolute or perfect cohesion in every race or on every issue; rather, minority political cohesion can be shown by proof that a *significant number* of minority group members *usually* vote for the same candidates. *Gingles*, 478 U.S. at 56, 106 S.Ct. at 2769; *see also supra* Part II.A.2. The district court's finding of political cohesiveness is supported by the results from six judicial elections in Lubbock County—results which indicate that over 87% of Black and Hispanic voters usually vote for the same candidate. Accordingly, we conclude that the State Defendants' complaint about the district court's finding of political cohesiveness is without merit.

With regard to the third *Gingles* factor, the district court, again relying on statistical and anecdotal evidence, found that the white bloc vote in Lubbock County judicial elections is legally significant. The district court first focused on the statistical evidence analyzed by Dr. Brischetto, which indicated that (a) minorities and whites voted differently in each of the six elections analyzed, and (b) the candidate preferred by Blacks and Hispanics won only two of the six elections. The district court also focused on the elections analyzed by Dr. Taebel, the State Defendants' expert. In the judicial elections analyzed by Dr. Taebel—two appellate court contests and two county court contests—minorities and whites voted differently, and the minority-preferred candidate lost. Finally, the district court credited the testimony Mrs. Mercado, who testified that, when she unsuccessfully ran for City Council in 1978, she carried all minority precincts and zero white precincts. Faced with this evidence, the district court could reasonably conclude that the white bloc vote in Lubbock County "is sufficiently strong

to defeat the minority community's preferred candidate."

(ii) *Totality of circumstances factors.* Surveying the totality of circumstances surrounding district court elections in Lubbock County, the district court found several factors indicative of minority vote dilution. The district court specifically found: a history of discrimination against Blacks and Hispanics in Lubbock County; racially polarized elections; the use of voting practices that enhance the opportunity for discrimination; evidence that minorities in Lubbock County continue to bear the effects of past discrimination; and a lack of success by minority candidates in Lubbock County judicial elections. We review each of these findings in turn, seeking to determine whether they are plausible in light of the record as a whole.

The district court found that Lubbock County shares Texas' history of racial discrimination against Blacks and Hispanics. This finding is amply supported by evidence chronicled elsewhere. In *Graves II*, a three-judge court recognized that authorities in Lubbock County maintained racially and ethnically segregated schools and public facilities until the 1970's. 378 F.Supp. at 654-55. Indeed, the State Defendants do not challenge the district court's finding with respect to the history of discrimination in Lubbock County. Instead, they candidly acknowledge the "long, shameful history of racial discrimination in Texas." Accordingly, we will not set the district court's finding aside as being clearly erroneous.

The district court further found a "strong relationship between race/ethnicity and voting patterns in Lubbock County." This finding is supported by evidence that, in each of the six judicial elections that were analyzed by Dr. Brischetto, minorities and whites voted differently. Dr. Brischetto determined, after analyzing these results, that there was an 87% correlation between race and voting patterns and that race explains 76% of the variance in these voting patterns. This finding is further supported by evidence from county court elections that were analyzed by Dr. Taebel, who testified that whites and minorities voted

differently in those elections. We are therefore not left with the definite and firm conviction that the district court erred in finding a strong degree of racially polarized voting in Lubbock County judicial elections.

As with the other target counties, the district court determined that certain features of the method by which state district court judges are elected in Lubbock County increase the risk of vote dilution. The two features that are present in Lubbock County district court elections—namely, the use of majority vote requirements in primary elections and the use of a numbered-post system— are also present in each of the other counties. We see no clear error in the district court's finding with respect to this totality of circumstances factor and therefore decline to set it aside.

We similarly find no clear error in the district court's determination that Blacks and Hispanics in Lubbock County continue to suffer the effects of past discrimination. As the statistics in Appendix IV demonstrate, Blacks and Hispanics lag unreasonably behind whites in Lubbock County in the areas of education and employment. Further, the evidence reveals that 26.8% of Black families and 23.7% of Hispanic families in Lubbock County live below the poverty line. By contrast, only 5.2% of white families live below the poverty line. Finally, evidence introduced by the State Defendants indicates that only 22 or 23 Black or Hispanic lawyers reside in Lubbock County. Thus, the record amply supports the district court's finding that racial discrimination continues to affect the lives of Blacks and Hispanics in Lubbock County, "including their access to and participation in the democratic system governing this State."

In examining the success of minority candidates in Lubbock County, the district court was again confronted with evidence that no minority has ever run for such office in Lubbock County. As discussed above, however, in the exogenous elections analyzed by the Plaintiffs' expert, the Hispanic candidate lost four out of six times. Given the sparsity of data and the ambiguous results from exogenous elections, we cannot say that the district court clearly erred

in finding that Black and Hispanic judicial candidates have been relatively unsuccessful in Lubbock County.

As to the other totality of circumstances factors, the district court found no evidence of a white-dominated slating organization and no evidence of racial campaign appeals in judicial elections. There being no challenge to these findings on appeal, we will accept them as being not clearly erroneous.

(iii) *Ultimate vote dilution inquiry.* Based on its subsidiary findings in Lubbock County, the district court determined that the method by which Texas elects district judges operates to dilute the voting strength of Blacks and Hispanics in that county. This finding was based on a number of social and political factors, which together provide strong evidence that Blacks and Hispanics in Lubbock County have an unequal opportunity to participate in the district court political process on account of their race. Assuming that the district court applied the correct legal standard, *see infra* Parts IV.B.3. and IV.C., we conclude that its ultimate vote dilution finding in Lubbock County is not clearly erroneous.

g. *Midland County*

Proceeding on behalf of Black and Hispanic voters in Midland County, where three (3) district court judges are elected in county-wide elections, the Plaintiffs offered evidence of the *Gingles* factors and several of the relevant factors under the totality of circumstances inquiry. The district court found this evidence persuasive and determined that the Plaintiffs satisfied the *Gingles* threshold inquiry and five of the relevant totality factors. The district court also determined that the Plaintiffs had demonstrated vote dilution in Midland County. Because the district court's determinations are supported by the record, we hold that they are not clearly erroneous.

(i) *Gingles factors.* With regard to the first *Gingles* factor, the district court determined that Blacks and Hispanics in Midland County are sufficiently large and geographically compact to constitute a majority in at least

one single member district. This determination was based in part on evidence that Blacks and Hispanics together constitute 19.7% of Midland's voting age population. This determination was further based on evidence that, because Blacks and Hispanics primarily reside in the northeastern, east central, and southeastern sections of Midland County, it would be possible to draw one district in which minorities constitute a majority of the voting age population—even excluding non-citizen Hispanics who are of voting age. Because this finding is plausible in light of the record, we will not set it aside as being clearly erroneous.

As in Lubbock and Ector counties, no Black or Hispanic has ever run for a district court seat in Midland County. Therefore, the Plaintiffs offered the results from other judicial elections to establish the second and third *Gingles* factors. In particular, the Plaintiffs offered evidence from three races in Midland County—two exogenous appellate court races and one justice of the peace race that encompassed the entire City of Midland.

Relying on the results of these elections, and the elections analyzed by Dr. Taebel, the district court found that Blacks and Hispanics are politically cohesive in Midland County judicial elections. This finding is amply supported by the record: In the three races analyzed by the Dr. Brischetto, more than 85% of Blacks and Hispanics combined voted for the same candidate. Moreover, as the percentage of minorities in a precinct increased, so did the percentage of support for the minority-preferred candidate. Finally, in the four judicial contests analyzed by Dr. Taebel, minorities voted cohesively. The district court's finding of political cohesiveness is not, therefore, clearly erroneous.

Again, the State Defendants challenge the district court's finding of political cohesiveness among Black and Hispanic voters. Pointing to a 1985 Midland city council race, a 1988 Midland school board race, and the 1986 Democratic primary race for the Texas Court of Criminal Appeals—all races in which a Black candidate opposed a Hispanic candidate—the State Defendants argue that "in most

instances ..., Black-supported candidates do not receive the support of a majority of Hispanic voters, or vice versa...." We cannot agree. As with Lubbock County, there is evidence in the record sufficient to support a finding that in judicial races in Midland County, a significant number of Blacks and Hispanics usually vote for the same candidate. Under *Gingles*, such evidence is sufficient to establish minority political cohesiveness. *See supra* Part II.A.2.

With regard to the third *Gingles* factor, the district court determined that white bloc voting usually operates to cancel out the vote of minorities in Midland County judicial elections. The district court again relied on election results studied by Dr. Brischetto. These results indicated that, in each of the three elections studied, the minority-preferred candidate lost despite the large percentages of combined minority support. The district court also relied on the testimony of Aguilla Watson, a Black woman who ran unsuccessfully for justice of the peace in Midland County in 1986. According to Watson, she won very few white votes and carried only four of the thirty-six precincts, only one of which included any significant amount of white cross- over voting. Finally, the district court relied on the election results analyzed by Dr. Taebel. These results showed that the minority-preferred candidate lost three of four times—despite some cross-over voting by whites. Because the district court's finding of legally significant white bloc voting is plausible in light of the record as a whole, we conclude that it is not clearly erroneous.

(ii) *Totality of circumstances factors.* In considering the totality of the circumstances surrounding Midland County's judicial races, the district court first found that Midland County shares Texas' history of official discrimination against Blacks and Hispanics. The district court was not clearly erroneous in making this finding. As has been chronicled elsewhere, the history of Midland County includes segregated schools, theaters, pools and restaurants. *See League of United Latin Am. Citizens v. Midland Indep. School Dist.*, 648 F.Supp. 596, 598 (W.D.Tex.1986), *aff'd*, 812

F.2d 1494, vacated, 829 F.2d 546 (5th Cir.1987).

Nor will we set aside the district court's finding of racially polarized voting in Midland County. The regression and homogeneous precinct analyses performed by Dr. Brischetto, and relied on by the district court, show a "strong relationship between race/ethnicity and voting patterns in Midland County." In the three elections studied by Dr. Brischetto, the correlation between race and voting patterns exceeded 89%, and 79% of the variance in voting patterns was explained by race.[48] Moreover, even in the elections analyzed by Dr. Taebel, minorities and whites voted differently. Given this evidence, we cannot say that the district court's finding of racially polarized voting is clearly erroneous.

The district court's finding of voting practices that enhance the opportunity for discrimination are similarly supported by the evidence. Midland County, like the other counties at issue, employs what amounts to a numbered-post system and requires candidates to obtain a majority of votes in primary elections. The potentially dilutive effects of these devices having been established elsewhere, see *supra* Part II.B.1.c., we will not set aside as clearly erroneous the district court's finding with regard to this aspect of Lubbock County's district court elections.

The district court was also warranted in finding that Blacks and Hispanics in Midland County continue to suffer the effects of past discrimination. After all, as the statistics in Appendix IV indicate, Blacks and Hispanics in Midland County are disproportionately represented among those who make less than $20,000 and those who live below the poverty line. Moreover, they are disproportionately under

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[48]Dr. Brischetto's testimony regarding racially polarized voting in Midland County is further supported by his analysis and testimony in *LULAC v. Midland I.S.D.*, 648 F.Supp. 596, 600 (W.D.Tex.1986), aff'd, 812 F.2d 1494 (5th Cir.1987), *vacated*, 829 F.2d 546 (5th Cir.1987), which was introduced at trial as evidence of racially polarized voting.

represented among those in Midland County who hold college degrees and managerial and professional positions. The record further indicates that only 10 Black and Hispanic lawyers reside in Midland County. The district court's finding on this totality of circumstances factor is therefore not clearly erroneous.

Finally, the district court did not clearly err in finding that minority judicial candidates have been unsuccessful in Midland County. No Black or Hispanic has ever run for a district court seat in Midland County. Moreover, in all of the judicial elections involving minority candidates in Midland County, the minority candidate lost. Accordingly, the district court's determination is amply supported by the record.

With respect to the other totality of circumstances factors, the district court found no supporting evidence. In particular, the district court found no evidence of a white dominated slating process and no evidence of racial campaign tactics. These findings are not challenged on appeal and we therefore will not set them aside as being clearly erroneous.

(iii) *Ultimate vote dilution finding.* Based on the evidence described above, the district court determined that Texas' method of electing district judges operates in Midland County to dilute the voting strength of Blacks and Hispanics. This finding is supported by strong evidence of racially polarized voting and the complete lack of success by minority judicial candidates in Midland County. Accordingly, we conclude that the district court's ultimate vote dilution finding, if based on the appropriate legal standard, *see infra* Parts IV.B.3. and IV.C., is not clearly erroneous.

h. *Tarrant County*

In Tarrant County, where twenty-three (23) state district judges are elected in county-wide elections, the Plaintiffs proceed only on behalf of Black voters. The district court found that Plaintiffs had introduced evidence sufficient to establish all three *Gingles* factors and five of the factors

listed as relevant in the totality of circumstances inquiry. The district court also found, based on these factors, that Texas' method of electing district court judges dilutes Black voting strength in Tarrant County. As explained below, we conclude that none of the district court's findings with regard to Tarrant County is clearly erroneous.

(i) *Gingles factors.* With regard to the first *Gingles* factor, the district court found that Blacks in Tarrant County are sufficiently large and geographically compact to constitute a majority in at least one single-member district. This finding was based on evidence that (a) Blacks constitute 10.4% of the voting age population in Tarrant County, (b) Blacks primarily reside in the center of Tarrant County, and (c) it would be possible to draw two single- member districts with a majority of Blacks in the voting age population. The finding is supported by the record and is therefore not clearly erroneous.

The district court also found that the Plaintiffs had satisfied the second *Gingles* factor with respect to Tarrant County. This finding, that Blacks in Tarrant County are politically cohesive, is not clearly erroneous. In the three general district court elections pairing a Black candidate against a white candidate, a clear majority of Blacks preferred the same candidate. According to the homogeneous precinct analysis done by Dr. Brischetto, more than 89% of Black voters in Tarrant County cast their votes for the same candidate. Moreover, in the 1988 Democratic presidential primary, 98% of Black voters in Tarrant County cast their vote for Jesse Jackson.

As for the third *Gingles* factor, the district court found that the white bloc vote in Tarrant County is sufficiently strong to usually defeat the Black community's preferred candidate. The district court based its finding partially on evidence that, in each of the three district court elections that were analyzed, the candidate preferred by Black voters lost, despite the presence of significant white cross-over voting. The district court also relied on testimony from Mary Ellen Hicks, a sitting Black district court judge in

Tarrant County who gained her position by being appointed to fill a vacancy. She testified that, the only time she ran against a white candidate in a county-wide election, she could not convince whites to vote for her and, accordingly, she lost the election. Because the district court's finding of legally significant white bloc voting is plausible in light of the record as a whole, we conclude that it is not clearly erroneous.[49]

(ii) *Totality of circumstances factors.* Under the totality of circumstances inquiry, the district court determined that: there is a history of official discrimination against Blacks in Tarrant County; judicial elections in Tarrant County are racially polarized; certain other features of the election scheme in Tarrant County enhance the opportunity for discrimination; Blacks in Tarrant County continue to suffer the effects of past discrimination; and Black judicial candidates have been relatively unsuccessful in Tarrant County. We review each of these findings in turn and conclude that all of the findings are supported by the record.

Tarrant County, the district court found, shares Texas'

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[49]The State Defendants again argue, relying on our decision in Campos, that because Blacks and Hispanics in Tarrant County are politically cohesive, the district court clearly erred in refusing to specifically consider and give equal weight to elections pitting whites against Hispanics for purposes of determining whether the white bloc vote in Tarrant County is legally significant. Again, the State Defendants' argument in this regard would require a fact finding that Blacks and Hispanics in Tarrant County are politically cohesive. Judge Higginbotham correctly observes in his proposed opinion that "the district court made no findings as to whether black and Hispanic voters were also a cohesive group" in Tarrant County. Dissenting Op. at [450a]. What he fails to mention, however, is that neither the State Defendants nor the defendant intervenors ever asked for such a finding. Thus, the State Defendants are raising an argument that was not raised before the district court and are requesting that we make a finding of fact on appeal. We decline to address their argument and hold that the error, if any, was not preserved for appellate review.

history of official discrimination against Blacks. This finding is supported by evidence that has been chronicled elsewhere. In particular, white citizens in Tarrant County, in addition to employing racial campaign tactics, opposed desegregation of all- white neighborhoods and community facilities. See Graves II, 378 F.Supp. at 644-45. We cannot say that the district court clearly erred in finding that racial discrimination is a part of Tarrant County's history.

The district court also found that judicial elections in Tarrant County are characterized by some degree of racially polarized voting. This finding is supported by Dr. Brischetto's regression analysis of the three district court elections in which Black candidates opposed white candidates—an analysis which demonstrated a 80% to 90% correlation between race and voting pattern. This finding is further supported by Dr. Taebel's analysis of five primary and general judicial elections involving Black candidates. In all of these races, Blacks and whites voted differently, and there was a correlation of 60%-63% between race and voting patterns. Accordingly, we will not set aside the district court's finding as being clearly erroneous.

The district court further found that three features of the current method of electing judges in Tarrant County enhance the opportunity for discrimination. These features are: the use of unusually large election districts, the use of majority vote requirements in primary elections, and the use of what amounts to a numbered post system. Because all these mechanisms increase the possibility of vote dilution, *see supra* Part II.B.1.c., the district court's finding on this totality of circumstances factor is not clearly erroneous.

Looking at other factors that are typically relevant to the totality of circumstances inquiry, the district court determined that Blacks in Tarrant County continue to bear the effects of past discrimination. This finding is amply supported by the data set forth in Appendix IV, which indicates that Blacks in Tarrant County lag unreasonably behind whites in the areas of income, education, and employment. Moreover, Blacks, who make up only 2.4% of

the Tarrant County bar, are substantially underrepresented in terms of the pool of qualified district court candidates. Finally, Blacks are disproportionately represented among those living below the poverty line. Accordingly, we conclude that this district court finding is not clearly erroneous.

We next address the district court's finding that Blacks have been relatively unsuccessful in bids to obtain a district court seat in Tarrant County. In making this finding, the district court was faced with ambiguous evidence. On one hand, there was evidence that, in the three elections pitting Black district court candidates against white candidates, the Black community's preferred choice won only once. On the other hand, there was evidence that, from 1985 to 1989, the proportion of Black district judges in Tarrant County roughly mirrored the Black population in Tarrant County. This latter evidence, which at first glance looks like consistent, proportional minority electoral success, might appear inconsistent with a vote dilution claim. *See supra* Part II.B.1.g. (citing *Gingles*). Upon further probing, however, we conclude that the evidence is not inconsistent with a vote dilution claim. At least two of the minority candidates that were on the district court bench in Tarrant County during this period were appointed and did not gain the seat through a contested election.[50] Thus, the district court could reasonably give less weight to this evidence and conclude that Blacks have been relatively unsuccessful in their bid to gain district court seats in Tarrant County.

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[50]According to testimony at trial, two of the three Black district judges were appointed and did not face opponents during the period from 1985 to 1988: Judge Clifford Davis and Judge Mary Ellen Hicks. In 1988, however, Judge Davis lost his bid to remain of the bench despite winning "every identifiable Black box by an overwhelming majority of the votes cast." The third Black judge that remained on the district bench in Tarrant County during this period, Judge Louis Sturns, ran and won as a Republican in 1986, despite garnering only some 10% of the Black vote.

Finally, with regard to the other totality of circumstances factors, the district court found no evidence of a white-dominated slating process and no evidence of racial campaign tactics. These findings are not challenged on appeal.

(iii) *Ultimate vote dilution finding.* Based on these subsidiary findings, the district court found that Texas' method of electing district judges operates in Tarrant County to dilute the voting strength of Blacks. This finding was based on a searching and practical inquiry into the past and present realities of the political landscape in Tarrant County. Moreover, it is supported by the district court's findings under the totality of circumstances analysis. We therefore conclude that the district court's ultimate vote dilution finding in Tarrant County, assuming it is based on the correct legal standard, *see infra* Parts IV.B.3. and IV.C., is not clearly erroneous.

i. *Travis County*

In Travis County, the last county at issue in this case, thirteen (13) state district judges are elected in county-wide elections. Proceeding only on behalf of Hispanic voters in Travis County, the Plaintiffs offered evidence of the first three *Gingles* factors and five of the relevant factors under the totality of circumstances inquiry. For the following reasons, we conclude that the district court clearly erred in finding the third *Gingles* factor— namely, legally significant white bloc voting. Accordingly, the district court's vote dilution finding with regard to Travis County must be reversed.

The district court, in addressing the first *Gingles* factor, reluctantly found that Hispanics in Travis County were sufficiently large and geographically compact to constitute a majority of the voting age population in at least one single-member district. This finding was based on evidence that Hispanics constitute 14.4% of Travis County's voting age population, that a fairly large number of Hispanics reside in the eastern portion of Travis County, and that it was possible to draw one "minimally contiguous" single-

member district in which Hispanic voters constituted a majority. Based on this evidence, it is at least debatable whether the district court clearly erred in finding that Plaintiffs satisfied the first *Gingles* factor; however, we need not decide this issue in view of our holding with respect to the third *Gingles* factor.

In analyzing the second and third *Gingles* factors, both the Plaintiffs' and the State Defendants' experts relied primarily on Democratic primary elections. Primaries were more important, according to the experts, because Travis County is the second most Democratic county in Texas. Indeed, at the time of trial, all of the district judges in Travis County were Democrats. Moreover, according to Dr. Taebel, most would agree that Travis County is "the most liberal county in the state."

Relying on three primary elections analyzed by the Plaintiffs' expert, the district court found that Hispanics are politically cohesive in Travis County judicial elections. Dr. Brischetto's analysis of three 1988 Democratic primary races—one district court race and two county-court-at-law races—demonstrated that Hispanics gave from 77% to 95% of their votes to the same candidates. Because this finding is plausible in light of the record, we conclude that it is not clearly erroneous.

Based on the same three primary elections, the district court also found legally significant white bloc voting in Travis County. We conclude that this finding is clearly erroneous. While in many cases it will be sufficient to analyze results from three (or conceivably, even fewer) races,[51] the three elections analyzed by Dr. Brischetto do not provide a sufficient basis on which to judge whether the

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[51]In *Gingles*, the district court's findings with regard to one of the locales were based on analysis of only three races. There the Court expressly noted that "[t]he number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances." 478 U.S. at 57 n. 25, 106 S.Ct. at 2770 n. 25.

white bloc vote usually defeats the candidate preferred by Hispanics. In one of the three primaries, there was a three-way contest between a white candidate, a Black candidate, and a Hispanic candidate, and the Black candidate won with 23% of the Hispanic vote and 52% of the white vote.[52] Moreover, in the district court primary pitting Gallardo, the Hispanic incumbent, against McCown, there was testimony indicating that the reason the Gallardo lost is because he was a "bad judge." Such testimony, we have noted, see *supra* note 6, is probative of whether whites will consistently vote against the candidate preferred by the minority group.

Elections not considered by Dr. Brischetto further call into doubt the district court's finding of legally significant white bloc voting. The State Defendants' expert, Dr. Taebel, testified that "[w]hites don't vote consistently as a bloc" in Travis County. He based this conclusion on an analysis of nine primary elections in Travis County with a Hispanic candidate. In those nine elections, the Hispanic candidate won three times, made the runoff twice, and lost four times. Thus, Dr. Taebel was correct when he observed that, Hispanic-preferred candidates in Travis County win some and lose some in Travis County primaries.

In addition, this court has recently acknowledged the willingness of white voters in Austin—who constitute a large majority of the voters in Travis County—to vote for Hispanic-preferred candidates. We stated:

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[52]Contrary to Judge Higginbotham's suggestion, we are not discounting this election solely because "it tends to demonstrate that the voting preferences of whites are not attributable to racial considerations." Dissenting Op. at [409a]. Instead, we question the reliability of this election because of evidence indicating that a Black candidate won with 23% of the Hispanic vote and only a bare majority of the white vote. This evidence, in Justice O'Connor's words, "would suggest that another candidate, equally preferred by [Hispanics], might be able to attract greater white support in future elections." *Gingles*, 478 U.S. at 100, 106 S.Ct. at 2792.

> Austin has repeatedly elected black and Mexican-American [city] council members during the past 17 years.... [T]he winning minority candidates frequently received well over fifty percent (50%) of the Anglo vote and were also the preferred candidates of the minorities. Minority candidates have routinely been elected to other posts in Austin and the surrounding Travis County.

Overton, 871 F.2d at 540.

In sum, after reviewing the evidence in the record, we are left with a definite and firm conviction that the district court was mistaken in finding legally significant white bloc voting in Travis County judicial races. While the Hispanic-preferred candidate lost in each of the three 1988 primaries that were analyzed by the Plaintiffs' expert, we conclude that, in Travis County, the pattern does not establish legally significant white bloc voting— especially given the success of Hispanic-preferred candidates in other judicial and legislative elections. Because Plaintiffs have failed to establish one of the *Gingles* threshold factors, the district court's ultimate vote dilution finding cannot stand with respect to Travis County. We therefore do not need to address the other totality factors.

3. *Effect of District Court's Refusal to Consider Partisan Voting Evidence*

Our next task in reviewing the district court's vote dilution findings under the accepted Section 2 framework is to consider the district court's treatment of partisan voting evidence. In particular, we must determine whether the district court's apparent refusal to consider this evidence renders erroneous its ultimate vote dilution findings in Bexar, Dallas, Ector, Harris, Lubbock, Midland, and Tarrant counties. After carefully considering the partisan voting evidence offered in this case, we conclude that the district court's refusal to consider such evidence does not render its vote dilution findings in those counties erroneous.

a. *The Partisanship Evidence*

At trial, the State Defendants, Judge Wood, and Judge

Entz introduced expert testimony purporting to show that factors other than racially motivated voting determine the outcome of Texas district court elections. According to these experts—Dr. Taebel, Judge Davidson, and Dr. Champagne—the determinative "other factor" in such elections is not the race of the voters or candidates, but the partisan affiliation of the voters and candidates. The dynamics of this partisanship factor, in the view of these experts, play out as follows: In the counties involved in this case, most of which are large, there are many district court races, which appear low on the ballot. These races generate only minimal voter interest. When voters prepare to vote in district court races, there is a substantial anonymity factor—meaning that voters are generally unaware of the name or race of the candidate. Consequently, most of the voters are uninformed about district court candidates and either fail to vote in such races or, reflexively, vote along partisan lines.

(i) *History of partisan politics in Texas.* Before describing how partisan politics allegedly explains voting behavior in Texas district court elections, we shall briefly outline the history of partisan politics in Texas. According to evidence introduced at trial, Texas was, until recently, a one-party state in which the majority of voters called themselves Democrats. Now, however, Texas appears to be a two-party state or a state that in some areas leans strongly toward the Republican Party.

Dr. Taebel testified about the evolution of Texas partisan politics in general. He stated that, "[b]ack in the '50's and '60's, the Democratic Party dominated Texas politics." During this time period, Dr. Taebel continued, Texas "had a one-party state, and therefore, all questions evolving around politics focused on the Primary elections." Dr. Taebel further stated that, "since the election of [Governor] Clements in about 1978, we have seen Texas become a very competitive two-party state." Because of this transformation, Dr. Taebel concluded, the focus is more extensively on general elections.

Dr. Champagne described one area of Texas—namely, Dallas County—which has undergone a dramatic shift in partisan politics. He testified that, during the 1980's, Dallas County went from "a one party Democratic system at the District Court level to essentially a one party Republican system." In making this conclusion, Dr. Champagne relied primarily on graphs indicating that: (1) from 1977 to 1988, the percentage of Republican district judges in Dallas County increased from 0% to almost 100%; and (2) from 1976 to 1988, Republican district court candidates in Dallas County went from winning 0% of contested elections to winning almost 100% of such elections. The last time a Republican district court candidate lost a contested seat in a Dallas County district court election, according to Dr. Champagne, was in 1978.

(ii) *How partisan politics operate in Texas district court elections.* The expert testimony on partisanship revealed that partisan voting patterns are not identical in the seven counties still at issue in this case. In four of the counties, Dallas, Ector, Lubbock, and Midland counties, voters demonstrate a consistent preference for Republican candidates. In other counties, the partisan voting pattern appears to be "in transition." And finally, in Harris County, there is evidence of a competitive, two-party system.

Dr. Taebel first testified about Dallas County, concluding that Republican candidates received strong support from voters. Based on his analysis of twenty-three elections, Dr. Taebel said, "what we see in Dallas County is very strong and solid support for Republican candidates." He further testified that, in his view, these elections "clearly illustrate partisanship is the best way to describe what is going on in Dallas County." When asked whether white voters would vote consistently as a bloc so as to usually defeat the Black-preferred candidate, Dr. Taebel responded:

> There are two blocs of White voters. As I said, one is the Democrat *White* bloc voters and one is the Republican bloc White voters. Both of those two blocs vote consistently for the nominees of their parties. It

just so happens in Dallas County there is more Republican voters than Democratic voters and the Republicans win all the time, or almost all the time.

Dr. Champagne also testified about Dallas County partisan voting patterns. Based on his analysis of district court elections from 1980 to 1988, he concluded that the race of the candidate has no impact on a candidate's ability to win elections. During that time period, there were nine primary and general elections combined in which a Black candidate opposed a white candidate, and the Black candidate won four of those contests. According to Dr. Champagne, when a Black candidate runs as a Democrat, he or she loses, but when a Black candidate runs as a Republican, he or she wins. Thus, Dr. Champagne concluded that the one-party nature of Dallas County's political landscape explains elections results: "Republicans win, Democrats, lose."

In concluding that the race of the candidate has nothing to do with his or her ability to win, Dr. Champagne also relied on a random survey of 1,000 Dallas County registered voters. This survey, which was designed to determine voter awareness of Dallas County public officials and judges, asked respondents the following questions: whether they voted in certain elections; whether they recognized the names of certain public officials and judges; whether they knew the position of certain public officials and judges; whether they knew the race/ethnic origin of certain public officials and judges; and finally, what factors influenced their decisions in judicial races. The results of this survey indicate that (a) registered voters could not generally recognize the names of district court judges, (b) registered voters did not know the race/ethnic origin of district judges, and (c) the reasons volunteered for voting decisions in district court races did not include the race of the candidate, but factors such as judicial integrity and honesty. This evidence, according to Dr. Champagne, supports his conclusion that Dallas County district court elections are characterized more by partisan voting than by racially motivated voting.

The other Republican counties, according to the testimony of Dr. Taebel, are Ector County, Lubbock County, and Midland County. With regard to Ector County, Dr. Taebel stated that "what we are seeing is that White Republicans constitute a, constitute a significant bloc vote," such that "White Republicans win." With regard to Lubbock County, Dr. Taebel observed that voters "tend to vote Republican" and that, in judicial races, there is "very extensive partisan voting patterns." Finally, Dr. Taebel characterized Midland County as "Republican territory" and, when asked what best describes election results in that county, Dr. Taebel responded that partisanship prevails: "Republicans beat Democrats."

Dr. Taebel also testified about two counties that appear to be undergoing a transition from a strictly Democratic county to a Republican County: Bexar County and Tarrant County. Bexar County, Dr. Taebel noted, has the smallest number of white Democratic voters, approximately 12%. Dr. Taebel then concluded, relying on results from twenty-eight elections, that "voting essentially follows party lines" in Bexar County. When asked specifically about district court general elections in Bexar County, Dr. Taebel responded that, "what you see in the General elections is that voters basically revert back to their partisan mode and vote for the candidate of their Party, irrespective of race or any other factors." With regard to Tarrant County, Dr. Taebel stated that, in "the early part of 1980's, it was primarily Democratic, or slightly Democratic, but in 1986, there was a major shift in Tarrant County toward the Republican Party." Based on this recent shift, Dr. Taebel concluded that the "party preference of the voters" best describes why certain candidates win and others do not.

Finally two experts, Dr. Taebel and Judge Mark Davidson, testified about how partisan politics operate in Harris County. According to Dr. Taebel, Harris County "is probably the most competitive county we looked at." Because of this competitiveness, Dr. Taebel explained, it is difficult to predict who will win elections. He noted,

however, that "since 1980, only 75 percent of the voters actually vote in judicial races."

The extent of straight-ticket voting in Harris County deserves special mention. Dr. Taebel testified that, of the voters who vote in Harris County judicial elections, almost 90% cast straight ticket votes. Judge Davidson testified to similar statistics. Such testimony is not surprising, since in any given election, voters in Harris County may be presented with as many as thirty (30) district court races. Further, according to both Dr. Taebel and Judge Davidson, approximately 45% of the straight ticket voters vote Democratic, while the other 45% of such voters vote Republican. Accordingly, 10% of the voters in Harris County, most of whom are white, end up deciding who wins elections. And, although these "discretionary" voters appear to vote in a variety ways, Judge Davidson conceded that it is reasonable to conclude that white judicial candidates in Harris County receive more of the so-called discretionary vote than Black candidates.

(iii) *The limitations of the partisanship evidence.* The experts also testified about the limitations of relying on partisan voting patterns. Dr. Champagne, on cross-examination, stated that, based on his studies of Dallas County elections, he did not know if voters equate "voting Republican" with voting safely white. Moreover, he conceded the possibility that partisanship and race are the same thing in Dallas County. Judge Davidson made a similar concession with regard to Harris County. He stated that there might be reasons other than bar polls, incumbency, and the type of campaign run by a candidate that influence the decisions of discretionary voters in Harris County.

Dr. Taebel, however, was the most forthright about the limitations of statistical analyses of partisan voting patterns. First, he stated that there is a strong identification between being Black or Hispanic and participating in the Democratic Party. Dr. Taebel also recognized at several points in his testimony that "you are always going to find" racially

polarized voting. Finally, Dr. Taebel emphasized that his statistical analysis of partisan voting patterns did not, and could not, explain why voters vote along party lines. He stated:

> I was basically analyzing how one can realistically describe the political process that exists in the nine different counties. My intent was not to find out the precise reasons why a candidate won or lost. My intent was to describe the overriding feature of partisan politics in nine counties. I think if you try, if I tried to get involved in campaign expenditures and incumbency, ratings by the Bar Association, it would be an impossible task to do.

(iv) *Summation of partisanship evidence.* The partisan voting evidence offered by the State Defendants, Judge Wood, and Judge Entz describes several features of Texas district court elections. First, it demonstrates that Texas district court elections are at least nominally partisan, in that the candidates are identified as being affiliated with either the Republican or Democratic Party. Second, the evidence demonstrates that, as a general rule, district court races appear at the bottom of a long ballot, and they are generally low profile elections. Third, because the races are low profile, the voters are generally unaware of either the names or the racial background of the various candidates. And finally, because the voters are relatively uninformed, those who actually vote tend to reflexively pull the straight ticket lever.

Thus, we are presented with evidence of predictable partisan voting patterns, evidence which purports to demonstrate that "partisanship" and not racially polarized voting best describes Texas district court elections. We are also told, however, that these predictable partisan voting patterns are not the result of an electorate informed about the views of the judicial candidates, but the result of voters being generally uninformed about the names and racial background of the various candidates. As Dr. Taebel recognized, where ballots are long, "it becomes very difficult

for voters to sort out each of the individual candidates. So straight party voting tends to take over in those types of elections."

b. The District Court's Treatment of the Evidence

It is not clear exactly how the district court treated the partisanship evidence offered by the State Defendants, Judge Wood, and Judge Entz. In at least one part of its memorandum opinion, the district court appeared to credit the partisanship testimony. In other parts, however the district court discredited the testimony. And finally, in at least two instances, the district court stated that the partisanship evidence was legally irrelevant.

First, we note that the district court admitted the partisanship evidence and apparently credited some of the testimony. At the beginning of its memorandum opinion, the district court acknowledged the partisan features of Texas district judge elections. It stated:

> It was brought to the Court's attention that perhaps a majority of voters in a General Election, and for than matter, in Primary Elections, have no idea of the qualification of a judge for whom they vote. Their vote is cast because a straight ticket is being cast, and a straight ticket includes judicial nominees from a particular party.

At other places in its memorandum opinion, the district court appeared to discredit the partisanship testimony. With regard to the evidence of straight ticket voting in Dallas County, the district court referred to a statement by one of the Plaintiffs' experts that "something other than just straight party voting is going on." Moreover, in response to the State Defendants' argument that partisan preference best accounts for electoral success in the various counties, the district court found that the totality of circumstances factors nonetheless "point to the continual effects of historical discrimination hindering the ability of minorities to participate in the political process."

Ultimately, however, the district court labelled the

partisanship evidence legally irrelevant.[53] With regard to Judge Davidson's testimony in Harris County, the district court stated that, although it found Judge Davidson to be a credible witness, his testimony was legally irrelevant. And, in its conclusions of law, the district court stated that, "under the controlling law, party affiliation, straight party ticket voting and campaign factors do not constitute legally competent evidence."

c. *The District Court's Error*

In concluding that the partisan features of Texas district court elections are legally irrelevant, the district court apparently relied on a part of Justice Brennan's opinion in *Gingles*, a part in which only a plurality of Justices joined. In particular, the district court relied on Justice Brennan's statement that, "under the 'results test' of § 2, only the correlation between the race of voter and selection of certain candidates, not the causes of the correlation, matters." 478 U.S. at 63, 106 S.Ct. at 2773. Thus, the district court rejected the partisanship evidence because it thought that such evidence was being offered to establish why minorities and whites vote differently. For the following reasons, we conclude that the district court erred in relying on the language from Justice Brennan's opinion and refusing

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[53]We confess to being somewhat baffled by Judge Higginbotham's reference to "dependence upon a winning Republican Party for proof of bloc voting," which he terms an "embarrassment to the findings of vote dilution in this case." Dissenting Op. at [378a]. Because the district court considered the partisan voting to be legally irrelevant, the findings of vote dilution in this case are devoid of any connection to partisan voting patterns or a "winning Republican Party." Moreover, no one has even argued here that "racial prejudice cements white majorities" in Republican strongholds but not in Democratic strongholds. Nor has anyone argued that "the Republican and Democratic Parties are mere proxies for racial and ethnic groups in Texas." Dissenting Op. at [403a]. Finally, we expressly reject Judge Higginbotham's insistence that such views underlie this majority opinion.

to consider the partisanship evidence.

First, we think that, even under Justice Brennan's *Gingles* opinion, the partisanship evidence was relevant. After all, in that opinion, Justice Brennan recognized that "the question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, ... and on a functional view of the political process." 478 U.S. at 45, 106 S.Ct. at 2764 (internal quotes and citations omitted). Moreover, even the language relied on by the district court only purported to exclude evidence explaining why voters vote the way they do. In this case, Dr. Taebel expressly disclaimed any intent to explain why voters vote the way they do.

Second, the language relied on by the district court was not embraced by a majority of the Justices. Justice White, in a separate concurrence, disagreed with Brennan's assumption that the race of the candidate does not matter in analyzing racially polarized voting patterns under Section 2. *See id.* at 83, 106 S.Ct. at 2782. Justice O'Connor was more specific in her disapproval of Brennan's statement that the causes of racially polarized voting are irrelevant. In her view, "evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters," might in some cases "affect the overall vote dilution inquiry." *Id.* at 100, 106 S.Ct. at 2792 (O'Connor, J., joined by three Justices, concurring in the judgment). Thus, in refusing to consider the partisan voting evidence, the district court appears to have erected, in Justice O'Connor's words, an "arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns." *Id.* at 101, 106 S.Ct. at 2792 (O'Connor, J., concurring in the judgment).

Accordingly, we hold that the district court should have considered the partisan features of Texas district court elections, including partisan voting patterns, in the totality of circumstances inquiry under the accepted analytical framework. To the extent the partisanship evidence

purported to demonstrate a lack of racial animus towards specific district court candidates, it was unquestionably relevant to the totality of circumstances inquiry. See *supra* Part II.B.2. More important, the partisan features of Texas district court elections are part of the "context of the total circumstances of the local electoral process...." *Id.* (quoting S.REP. at 16, 1982 U.S.C.C.A.N. at 193). Such features are also relevant to the overall vote dilution inquiry of whether members of a minority group have an unequal opportunity to participate on account of race. Thus, the partisanship evidence should have been considered in the totality of circumstances inquiry—as part of the "searching practical evaluation of the 'past and present reality' " in the counties at issue. See *supra* Part II.B.2. (quoting S.REP. at 30, 1982 U.S.C.C.A.N. at 208).

d. *The Effect of the Error; Whitcomb Considered*

Having held that the district court erred in refusing to consider the partisan features of Texas district court elections, we must now determine how that error affects the district court's ultimate vote dilution findings in the seven counties for which such evidence was offered. We have already explained that where, as here, "a finding of fact is based on the misapprehension of governing legal standards, it loses the insulation of the 'clearly erroneous' rule." *See supra* Part IV.A. (quoting *Armco Burglar Alarm*, 693 F.2d at 1162). We have also explained, however, that where, as here, a district court's finding loses the protection of the clearly erroneous rule, "a remand is the proper course unless the record permits only one resolution of the factual issue." *See supra* Part IV.A. (quoting *Pullman-Standard v. Swint*, 456 U.S. at 292, 102 S.Ct. at 1792). Thus, as an appellate court, we must decide (a) whether to reverse and remand the case to the district court with instructions to consider the partisanship evidence; (b) whether to reverse and render judgment for the State Defendants; or (c) whether to affirm the district court's vote dilution findings. Of course, we cannot pursue one of the latter two options unless, in light of the partisanship evidence, "the record permits only one

resolution" of the ultimate vote dilution inquiry in the seven counties at issue.

The State Defendants, Judge Wood, and Judge Entz argue that we need not remand this case for further factfinding by the district court. They contend that, if we consider the partisan features of Texas district court elections, the record permits only one resolution of the ultimate vote dilution inquiry—a resolution in which we reverse the district court's ultimate vote dilution findings and render judgment in favor of the State Defendants. Citing *Whitcomb v. Chavis*, they reason that the evidence of partisan voting patterns precludes any finding of vote dilution under Section 2. We disagree.

In *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), a case that continues to have relevance under the amended Section 2, *see* S.REP. at 20-23, 32-33, 1982 U.S.C.C.A.N. at 197-201, 209-211, the Court rejected a challenge by Black voters in Marion County, Indiana to an at-large election scheme. In rejecting this challenge, the Court reasoned that interest group politics untainted by a racial minority's unequal opportunity to participate in the political process will not support a vote dilution claim. The Court, after recognizing that there was no evidence of an intent to discriminate against Blacks in Marion County, stated:

> Nor does the fact that the number of [Black] residents who were legislators was not in proportion to [the Black] population satisfactorily prove invidious discrimination absent evidence and findings that [Black] residents had less opportunity than did other Marion County residents to participate in the political processes and elect legislators of their choice.

Id. at 149, 91 S.Ct. at 1872. The Court in *Whitcomb* then observed that there was no evidence that Blacks in Marion County had an unequal opportunity to participate in the

political process.[54] Indeed, the plaintiffs in *Whitcomb* conceded that Black voters had an equal opportunity to participate in the political process. Because Blacks would have had "no justifiable complaints about representation" if the Democratic candidates had won all of the elections, the Court concluded that "the failure of [Blacks] to have legislative seats in proportion to [their] population emerges more as a function of losing elections than of built-in bias against poor [Blacks]." *Id.* at 152, 153, 91 S.Ct. at 1873. Ultimately, the Court in *Whitcomb* stated:

> On the record before us plaintiffs' position comes to this: that *although they have equal opportunity to participate* in and influence the selection of candidates and legislators, and although [Blacks] vote [ ] predominantly Democratic and that party slates candidates satisfactory to [them], invidious discrimination nevertheless results when [Blacks], along with all other Democrats, suffer[ ] the disaster of losing too many elections.... The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, *there is no indication that this segment of the population is being denied access to the political system.*

403 U.S. at 153, 155, 91 S.Ct. at 1874, 1875 (emphasis

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[54]In particular, the Court noted that there was nothing in the record suggesting that Blacks were "not allowed to register to vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen." *Whitcomb*, 403 U.S. at 149, 91 S.Ct. at 1872. Moreover, there was no evidence that Blacks in Marion County "were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats." *Id.* at 150, 91 S.Ct. at 1872. Instead, the record revealed that under the multimember district in Marion County, two Black senators and seven Black representatives had been elected over an eight year period.

added)

The State Defendants, Judge Wood, and Judge Entz read *Whitcomb* too broadly. The Court in *Whitcomb* did not hold that, by itself, statistical evidence of strong partisan voting patterns forecloses a vote dilution claim. Nor does the Court's decision in *Whitcomb* preclude a finding of vote dilution absent evidence that partisan voters are motivated by racial animus toward particular candidates. Rather, *Whitcomb* stands for a much narrower proposition: Where there is evidence of partisan voting or interest group politics *and no evidence* that members of the minority group have an unequal opportunity to participate in the political process on account of race or color, the minority group's vote dilution claim will fail.[55]

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[55]To buttress his claim that only "interest group politics" are at work in the Texas counties at issue in this case, Judge Higginbotham points to the Seventh Circuit's decision in *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357 (7th Cir.1992), and quotes Judge Easterbrook's statement that "[t]he Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates." Dissenting Op. at [402a]. What Judge Higginbotham fails to disclose, however, is the context in which Judge Easterbrook made this statement.

In *Baird*, Blacks challenged the method by which Marion County elected the twenty-nine members of its city-county council. Twenty-five of the city-county council seats were filled by elections from single-member districts, while four of the seats were filled by at-large elections. At the time of trial, Blacks constituted 21.28% of Marion County's population and approximately 60% of the population in seven of the twenty-five (or 24.14% of all twenty-nine seats). Thus, while Blacks had an "undiminished right to participate in the political process" and elect representative of their choice, see 976 F.2d at 359, they were not guaranteed the opportunity to elect representatives in the four at-large seats.

Faced with this evidence, the district court granted summary judgment in favor of the defendants, concluding that, "[i]f [Black] voters are politically cohesive, they will elect candidates of their

(continued...)

Thus, *Whitcomb* must be read in the context of the community in which the vote dilution claim was being brought—a community in which the Black ghetto residents

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[55](...continued)
choice and obtain representation in the Council exceeding their numbers in the electorate; and if they are not cohesive, they cannot satisfy the requirements for relief under *Gingles*." *Id.* The Seventh Circuit agreed, noting that under the current election plan in Marion County, "losses by the candidates black voters prefer may have more to do with politics than with race." 976 F.2d at 361. The Seventh Circuit further observed, that "[t]he Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates." *Id.* (emphasis added).

By citing *Baird*, Judge Higginbotham suggests that circumstances surrounding the election of city-council members in Marion County, Indiana are like the circumstances surrounding the election of district judges in the nine Texas counties at issue in this case. Even a cursory reading of the case, however, reveals the marked differences between the two political landscapes. Texas does not elect its district court judges from single member districts, and the minority groups in the various counties, even if they were 100% politically cohesive, would not be guaranteed the opportunity to elect representatives even approaching their numbers in the community.

Thus, our conclusion about the significance of partisan voting patterns in this case says little about the significance of partisan voting—or interest group politics—under other circumstances. We are not suggesting that, in a situation like *Baird*, where a minority group was guaranteed through subdistricting the opportunity to elect representatives of its choice roughly in proportion to its population in the community, the minority group's failure to achieve proportional representation—due to interest group politics—would support a vote dilution claim. In such a case, members of the minority group would simply be unable to demonstrate, in the words of Section 2, that they had "less opportunity ... to participate in the political process and to elect representatives of their choice." In the context of a case like *Baird*, we would agree with Judge Easterbrook's statement that "[t]he Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates." 976 F.2d at 361.

conceded that they had an equal opportunity to participate in the political process. The Black ghetto residents of Marion County, Indiana presented evidence that they were politically cohesive, evidence that they failed to elect representatives in proportion to their population, and evidence that they currently suffered from socioeconomic disparities. The plaintiffs in Whitcomb did not, however, at least according to the Supreme Court opinion and the district court's opinion, see *Chavis v. Whitcomb*, 305 F.Supp. 1364 (S.D.Ind.1969), present evidence of a history of official discrimination touching the rights of Blacks to vote and participate in the political process. Nor did the Blacks in Whitcomb present evidence that the socioeconomic disparities from which they suffered were the result of, or on account of, their race or color.

To suggest that Whitcomb would have been decided the same had the lawsuit challenged at-large election practices in, for example, Dallas County, Texas, is to ignore the official discrimination in voting that gave rise to the passage of the Voting Rights Act. As the Senate Report accompanying the amended Section 2 stated, "the purpose of the Voting Rights Act was 'not only to correct an active history of discrimination, the denying to [Blacks] of the right to register and vote, but also to deal with the accumulation of discrimination.' " S.REP. at 5, 1982 U.S.C.C.A.N. at 182. The Voting Rights Act was further designed, according to the Senate Report, to deal with the new and "broad array of dilution schemes [that were being] employed to cancel the impact of the new black vote." *Id.* at 6, 1982 U.S.C.C.A.N. at 183. The state of Texas and the various counties at issue in this case, unlike—as far as we can tell—the state of Indiana and Marion County, have impeded the opportunity of Blacks and Hispanics to participate fully in the political process. See, e.g., *Texas v. United States*, 384 U.S. 155, 86 S.Ct. 1383, 16 L.Ed.2d 434 (1966) (invalidating Texas' poll tax); *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (invalidating the use of racially discriminatory "pre-primary" elections by private organization associated

with the Texas Democratic party); *Beare v. Smith*, 321 F.Supp. 1100 (invalidating Texas law requiring voters to register annually because it deprived minorities of the right to participate in the electoral process on an equal basis), *aff'd sub nom.*, *Beare v. Briscoe*, 498 F.2d 244 (5th Cir.1974). And, as the State Defendants concede in their brief on appeal, the "long, shameful history" of racial discrimination in Texas "finds its present day reflection in the disproportionately lower socioeconomic status of Blacks and Hispanics as groups, as compared to Anglos as a group."

In this case, we are presented only with statistical evidence that correlates the party of candidates with voting behavior. We are not presented with evidence that partisan politics explains minority voters' unequal opportunity to participate in the political process any better than, or more importantly, to the exclusion of, racial factors. Dr. Taebel specifically stated that his "intent was not to find out the precise reasons why a candidate won or lost." He further suggested that "it would be an impossible task" to attempt, through a multivariate analysis, to determine the relative effect of the various factors that could influence voters' decisions.[56]

The other witnesses also conceded that they ultimately could not exclude the possibility that race was at work. Judge Davidson, who testified about discretionary voters in Harris County, conceded that reasons other than bar polls, incumbency, and the type of campaign run by a candidate might influence the decisions of those discretionary voters. Dr. Champagne, who testified about partisan voting in Dallas County, admitted that race and partisanship could be

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[56]In her brief on remand, Judge Wood argues that Dr. Taebel's regression analysis, "which factored in the political party of the candidate," is the "*only* statistical proof that could accurately *explain* the outcomes in the partisan races being analyzed." Judge Wood's Brief on Remand at 26 (emphasis in original). Given Dr. Taebel's express disclaimer that he was *not* explaining why voters vote the way they do, we reject this argument.

the same thing.

Moreover, in several of the counties involved, there was evidence that racial factors continue to play a role in judicial elections. In Dallas County, for example, there were two instances of racial campaign appeals in recent elections. And Dr. Engstrom, the Plaintiffs' expert, opined that general district court elections in Harris County are "more of a filter for Black candidates than Democratic candidates." This testimony was based on evidence that, from 1980 to 1988, 52% of all white Democratic district court candidates won contested general elections, while only 12.5% of all Black Democratic district court candidates won contested elections during the same time period. Finally, Dr. Brischetto, the other expert employed by the Plaintiffs, stated that, in his studies of voting behavior, "ethnicity is still a major, the major determinant of how people vote."

Even if we assume that partisan politics best *describes* voting behavior in the seven counties at issue, we are still faced with substantial evidence that minority voters in those counties have an unequal opportunity to participate in the political process on account of their race or color. In each of the counties at issue—in Bexar County, Dallas County, Ector County, Harris County, Lubbock County, Midland County, and Tarrant County—there is evidence of a history of discrimination against minorities that violated their rights to participate in the political process, evidence of strong to severe racially polarized voting,[57] evidence that minorities

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[57]In his dissent, Judge Higginbotham suggests that there was also racially polarized voting in *Whitcomb*. Dissenting Op. at [386a]. To get to this conclusion, of course, Judge Higginbotham has to combine the evidence that the "ghetto area"—an area which included whites and blacks—voted overwhelmingly Democratic with evidence that Republican candidates usually won. And, although he states, citing Whitcomb, 403 U.S. at 149-53, 91 S.Ct. at 1872-1874, that "white voters consistently supported Republicans," the Supreme Court never mentioned this fact. The only voting behavior mentioned by the

(continued...)

continue to bear the effects of past discrimination, and evidence that minority candidates, especially those who are sponsored by the minority community, are unsuccessful in their bids to hold judicial offices like the district court bench. *See supra* Part IV.B.2. All of these factors point to an unequal opportunity to participate in the political process[58] and, taken together, raise an inference that race or color is at least partly responsible.

Accordingly, we hold that the Supreme Court's decision in *Whitcomb* does not preclude a finding of vote dilution in the seven counties at issue. The partisanship evidence that

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[57](...continued)
Court in Whitcomb was that the "ghetto voted overwhelmingly Democratic." Thus, while the Court did focus on the fact that ghetto Blacks in Whitcomb were politically cohesive, the Court did not, under a straightforward reading of the case, focus on the existence or extent of racially polarized voting in Marion County elections.

[58]In her brief on remand, Judge Wood suggests that minority voters can show an unequal opportunity to participate in the political process only by producing evidence of formal barriers—i.e., that they are not allowed to register or vote, to choose the political party they desire to support, to participate in its affairs, or to be represented when candidates are chosen or slated. Judge Higginbotham would agree. See Dissenting Op. at [384a]. In response to this suggestion, we note only that, under the amended Section 2, the concept of unequal opportunity to participate in the political process is a broad concept. Indeed, the whole vote dilution principle is premised on the notion that "[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted.... It also includes the right to have the vote counted at full value without dilution or discount." *Reynolds v. Sims*, 377 U.S. 533, 555 n. 29, 84 S.Ct. 1362, 1378 n. 29, 12 L.Ed.2d 506 (1964) (quoting Justice Douglas). Thus, the fact that minorities are not inhibited from becoming candidates or overtly hindered in casting their votes is not dispositive of whether they have an equal opportunity to participate in the political process. *See* S.REP. at 30 n. 120, 1982 U.S.C.C.A.N. at 208 n. 120.

was presented to the district court simply does not sufficiently cancel out or negate the other factors that raise an inference that minority voters have an unequal opportunity to participate in the district court political process. Nor does the evidence negate the inference that race or color is at work in the various counties at issue.

The crucial question thus becomes, not whether to reverse and *render* judgment for the State Defendants, but rather, whether to remand the case to the district court for consideration of the partisan voting evidence. This question, in turn, depends on whether, despite the district court's failure to consider the partisanship evidence, the record nonetheless requires us to affirm the district court's ultimate vote dilution findings under the accepted Section 2 framework. In answering this question, we must determine specifically whether the partisanship evidence somehow undercuts or minimizes the district court's vote dilution findings in each of the seven counties for which such evidence was offered.

In our view, the partisanship evidence does not undercut or minimize the district court's findings that, under the totality of the circumstances, minority voters in the seven counties at issue have an unequal opportunity to participate in the political process on account of race. The partisanship evidence does not purport to establish that minority voters are able to participate in the political process and elect representative of their choice. Rather, the evidence purports to show that, because voters do not know the races or names of the candidates, voters do not vote with specific racial animus towards particular candidates. Such statistical evidence of partisan voting does not, and could not, detract from evidence suggesting that minority voters' unequal opportunity to participate in the political process is linked to race.

Moreover, not only do the partisan features of Texas district court elections fail to undercut or minimize the district court's ultimate vote dilution findings, they also serve to reinforce or enhance the possibility of vote dilution.

After all, the evidence of partisan voting patterns in this case is readily distinguishable from the kind of "partisan politics" governing races at the top of the ballot. As already discussed, the partisan voting patterns in this case result from several unique features of Texas district court races: There are many district court races in most of the counties at issue, and as a general rule, these races appear low on the ballot. There is also, as a general rule, low voter interest in such races and a resulting low level of voter knowledge about the qualifications, the race, and even the name of candidates. This anonymity factor combines with the mechanism in Texas allowing straight ticket voting to produce a substantial correlation between voting and partisan preference.[59]

When viewed in this light, the so-called partisanship evidence does not rebut or minimize the other strong evidence that minorities have an unequal opportunity to participate in the district court political process on account of race or color. Instead, it is just another feature of large, multimember election districts—a feature that reinforces the minority group's unequal opportunity to participate. Because of the low profile nature of district court races, the high degree of anonymity involved in such races, and the resulting high incidence of straight-ticket voting, district court candidates who are sponsored by the minority community in the various counties at issue face an unusually high hurdle in winning elections: They generally cannot, due

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[59]As Dr. Taebel's historical testimony alludes to, before 1980, minority-preferred candidates lost in Democratic primary elections—generally, to white Democrats. *See White v. Regester*, 412 U.S. at 767, 93 S.Ct. at 2340. In 1989, we are told, minority preferred candidates may make it to the general election, but once there, they lose to white Republicans. From the vantage point of minority voters—which is the vantage point of Section 2—it is difficult to see how the arrival of a two party system in Texas has altered their ability to participate in the political process and elect candidates of their choice.

to their lack of resources, mount a campaign in which they could gain county-wide name recognition and thereby overcome the anonymity factor which dominates district court elections.

Accordingly, we conclude that, even though the district court erred in refusing to consider the partisan features of Texas district court elections, the record nonetheless permits only one resolution of the ultimate vote dilution inquiry in Bexar, Dallas, Ector, Harris, Lubbock, Midland, and Tarrant counties. The partisanship evidence demonstrates only that voters in district court elections, because they are unaware of the race of the candidates, could not be motivated by specific racial animus towards those candidates. The evidence does not demonstrate that voters, knowing the race of the candidates involved, nonetheless vote without regard to race. Thus, this "partisanship" evidence does not demonstrate the absence of general racial animus in the electorate, and it does not rebut the district court's other findings under the *Gingles* and totality of circumstances inquiry—findings which demonstrate an unequal opportunity to participate in the political process on account of race or color.

As we have explained, *see supra* Part II.C., the ultimate vote dilution inquiry does not focus narrowly on whether there is current racial animus in the electorate. Instead, the ultimate vote dilution inquiry asks whether, in the context of the particular electoral process, minorities have an unequal opportunity to participate on account of race or color. To demonstrate a lack of opportunity "on account of race or color," minority voters challenging an at-large election scheme need not show racial animus in the electorate, but may rely on factors in the totality of circumstances inquiry to raise an inference that race is at work. While the presence of general racial animus is clearly significant to the question of whether minority voters' unequal opportunity to participate in the political process is on account of race or color, the absence of general racial animus, as we have already explained, see *supra* Part II.B.2, will not weigh

heavily against the minority group. More importantly, where, as here, evidence of partisan voting patterns suggests that the electorate, being generally uninformed, is not motivated by specific racial animus towards candidates, such evidence will not defeat or undercut a vote dilution claim—so long as the minority group demonstrates that its members have an unequal opportunity to participate in the political process and that this unequal opportunity is linked to race or color.

4. *Summation*

In sum, we hold that the district court did not err in finding, under the accepted Section 2 framework, that Plaintiffs proved their vote dilution claims in eight of the nine target counties. Because no partisanship argument was raised with regard to the district court's ultimate vote dilution finding in Jefferson County, we affirm that finding under the clearly erroneous standard. With regard to the district court's ultimate vote dilution findings in Bexar, Dallas, Ector, Harris, Midland, Lubbock, and Tarrant counties, we affirm the district court's findings even though they are not protected by the clearly erroneous rule. Finally, because the Plaintiffs did not satisfy the *Gingles* threshold inquiry in Travis County, we reverse the district court's ultimate vote dilution finding with regard to that county.

C. Review of the District Court's Vote Dilution Findings Under the Proposed Balancing Framework

We now proceed to review, under the proposed balancing framework set forth in Part II of this opinion, the district court's vote dilution findings in eight of the nine counties against the asserted state interests. Of course, the district court did not apply any kind of balancing framework, because back in 1989, no such framework had ever been suggested or contemplated. Thus, if a balancing framework is now required, the district court's ultimate vote dilution findings in each of the counties lose the insulation of the clearly erroneous standard of review.

Under such a balancing framework, were it not for the weight of the state interests in this case, we would be

required to remand this case to the district court with instructions to balance state interests against proven vote dilution. Given the uncompelling or insubstantial nature of the threatened state interests in this case, see *supra* Part III.D.3., however, this record only permits one result.[60] The significant amount of vote dilution in Bexar, Dallas, Ector, Harris, Jefferson, Midland, Lubbock, and Tarrant counties outweighs Texas' legitimate state interests in preserving the administrative advantages of the current method of electing district judges, in allowing judges to specialize, and in "linking" a district court's venue with its electoral base.

The vote dilution findings in each of the eight counties, as we have already explained, find strong support in the record. In each of those counties, there is substantial evidence that the voting strength of Blacks, Hispanics, or Blacks and Hispanics combined, is cancelled out by the use of an at-large election scheme. For example, in every county, elections are polarized along racial lines, and minority candidates who are sponsored by the minority community have been suspiciously unsuccessful in getting elected to district court seats. In every county, minorities who have suffered from a history of official discrimination continue to lag unreasonably behind whites in the areas of income, education, and employment.

Accordingly, we conclude that even if the district court was required to apply a balancing framework in making its Section 2 liability findings, we would still affirm those findings in Bexar, Dallas, Ector, Harris, Jefferson, Lubbock, Midland, and Tarrant counties. The Plaintiffs proved substantial vote dilution in each of the eight counties, while

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[60]The State Defendants and Judge Entz suggest that, because of the state interests asserted in this case, the Plaintiffs were required to prove their vote dilution claims by clear and convincing evidence. We reject this suggestion. They offer no authority for increasing the Plaintiffs' burden of proof.

the state interests asserted by the state of Texas are little more than tenuous. Thus, the record permits only one resolution even under the proposed balancing framework: the state interests do not outweigh this proven vote dilution.

V. REMEDY

Because we have affirmed the district court's Section 2 liability findings in eight of the nine counties, we must now address questions about the appropriate remedy. We address first the question of which unit of government has priority in devising a remedial plan. We then address the question of the criteria that must govern any remedy imposed by the district court. And finally, we review the interim plan already devised by the district court.

With regard to the first question, it is clear that the affected political subdivision should be given the first opportunity to develop a remedial plan for Section 2 violations. *See Westwego III*, 946 F.2d at 1124; *Cook v. Luckett*, 735 F.2d 912, 918-19 (5th Cir.1984); see also *East Jefferson Coalition for Leadership & Dev. v. Parish of Jefferson*, 926 F.2d 487, 490 (5th Cir.1991); *Gretna*, 834 F.2d at 504. The affected political subdivision in this case is the state of Texas. Accordingly, the state of Texas must be left to develop, in the first instance, a plan that will remedy the Section 2 violations found in this case. The federal district court will have the power to devise a remedy only if the state of Texas fails to develop a remedial plan in a timely manner or fails to develop a plan that fully remedies the current vote dilution. *See Cook*, 735 F.2d at 918-19 (recognizing that a district court may be forced to impose a remedial scheme submitted by a private litigant or formulate one of its own when plan submitted by legislature is "uncorrectably invalid").

If the district court is required to develop its own remedial plan, it must proceed with extreme caution. As an initial matter any plan developed by the district court must: (a) cure the dilution of minority voting strength; and (b) intrude on state policy choices only where necessary. *See*

Upham v. Seamon, 456 U.S. 37, 41-42, 102 S.Ct. 1518, 1521, 71 L.Ed.2d 725 (1982); *White v. Weiser*, 412 U.S. 783, 796-97, 93 S.Ct. 2348, 2355, 37 L.Ed.2d 335 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 160-61, 91 S.Ct. 1858, 1878, 29 L.Ed.2d 363 (1971). In this case, state policy choices may require the district court to carefully consider remedies such as cumulative voting, limited voting, or subdistricting. And, if it becomes apparent that a subdistricting remedy will be required, the district court should also consider whether multi-member subdistricts, at least in the larger counties, would be feasible.

We turn finally to the district court's interim remedy, which requires district judges in Texas to be elected in non-partisan elections from single- member districts. This order cannot stand under the requirements set forth by the Supreme Court in *Upham*, *White*, and *Weiser*, because it unnecessarily brushes aside Texas' expressed interest in electing judges through partisan elections. The district court gave no explanation for rejecting Texas' system of partisan elections, nor did it hold a hearing on the issue. Because the equitable powers of the district court neither encompass nor justify the interim plan ordering non-partisan elections from single-member districts, we vacate the district court's interim remedial plan.

Thus, we remand this case to the district court with the following instructions concerning the remedial phase of this lawsuit: The district court is directed to give the state of Texas 180 days to develop and submit to the United States Attorney General, in accordance with Section 5 of the Voting Rights Act, a plan to remedy the current vote dilution in Bexar, Dallas, Ector, Harris, Jefferson, Lubbock, Midland, and Tarrant counties. If and when the United States Attorney General preclears the plan submitted by the state, the district court shall review the plan to determine whether it rectifies the current vote dilution in those counties and whether it otherwise complies with the law. And finally, if the state of Texas does not develop and preclear a remedial plan in a timely fashion, or if the

precleared plan does not, in the district court's view, comply with Section 2 of the Voting Rights Act or other provisions of law, the district court shall determine, in accordance with the guidelines set forth above, what remedial plan to impose.

VI. CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in determining that Texas' method of electing district court judges—as that method operates in Bexar, Dallas, Ector, Harris, Jefferson, Lubbock, Midland, and Tarrant counties—violates Section 2 of the Voting Rights Act. We conclude, however, that the district court did err in finding a Section 2 violation in Travis County, Accordingly we AFFIRM the district court's judgment as to eight of the nine target counties, REVERSE the district court's judgment as to Travis County, and REMAND for the imposition of a remedy that is consistent with this opinion.

APPENDIX I

Judicial Districts with Fewer than 40,000 People

Judicial District:	Counties:	1990 Population:
39	Haskell	11,723
	Kent	
	Stonewall	
	Throckmorton	
50	Baylor	11,823
	Cottle	
	King	
	Knox	
110	Briscoe	14,571
	Dickens	
	Floyd	
	Motley	
15	Lamb	15,072
287	Bailey	16,927
	Parmer	
91	Eastland	18,488

132	Borden	19,433
	Scurry	
259	Jones	19,806
	Shackleford	
344	Chambers	20,088
222	Deaf Smith	21,431
	Oldham	
121	Terry	22,004
	Yoakum	
46	Foard	22,198
	Hardeman	
	Wilbarger	
20	Milam	22,946
100	Carson	23,703
	Childress	
	Collingsworth	
	Donley	
	Hall	
223	Gray	23,967
29	Palo Pinto	25,055
316	Hutchinson	25,689
90	Stephens	27,136
	Young	
66	Hill	27,146
109	Andrews	27,616
	Crane	
	Winkler	
266	Erath	27,991
286	Cochran	28,576
	Hockley	
355	Hood	28,981
143	Loving	29,074
	Reeves	
	Ward	
32	Fisher	29,452
	Mitchell	
	Nolan	

69	Dallam	29,818
	Hartley	
	Moore	
	Sherman	
235	Cooke	30,777
112	Crockett	31,849
	Pecos	
	Reagan	
	Sutton	
	Upton	
82	Falls	33,223
	Robertson	
97	Archer	35,271
	Clay	
	Montague	
220	Bosque	36,239
	Comanche	
	Hamilton	
77	Freestone	36,764
	Limestone	
130	Matagorda	36,928
31	Gray	37,734
	Hemphill	
	Lipscomb	
	Roberts	
	Wheeler	
118	Glasscock	38,746
	Howard	
	Martin	
35	Brown	38,902
	Mills	
273	Sabine	39,619
	San Augustine	
	Shelby	
13	Navarro	39,926
329	Wharton	39,955

Source:Texas Judicial Council,
Sixty-Third Annual Report (Supp.1991).

APPENDIX II
Population of Potential Subdistricts

County	Total Population[61]	No. of District Court Seats	Population per Subdistrict[62]
Harris	2,409,544	59	40,840
Dallas	1,556,549	36	43,237
Tarrant	860,880	23	37,430
Bexar	988,800	19	52,042
Travis	419,335	13	32,257
Jefferson	250,938	8	31,367
Lubbock	211,651	6	35,275
Ector	115,374	4	28,844
Midland	82,636	3	27,545

Source: Plaintiffs' trial exhibits

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[61]Figures as given by the district court. See District Court Opinion at [497a-501a].

[62]Based on 1980 population figures; assumes each subdistrict is a single-judge subdistrict.

APPENDIX III
The First *Gingles* Factor: The District Court's Findings Regarding the Size and Geographic Compactness of Minority Voting Groups[63]

County	Plaintiffs Proceed on Behalf of	Minority Voters As a Percentage of Voting Age Population:	Total No: of District Court Seats:	No. of Compact Single-Member Districts in which Minority Voters Would Constitute Majority:
Harris	Black voters	18.2	59	9
Dallas	Black voters	16.0	36[64]	7
Tarrant	Black voters	10.4	23	2
Bexar	Hispanic voters	41.4	19	8
Travis	Hispanic voters	14.4	13	1
Jefferson	Black voters	24.6	8	2
Lubbock	Black and Hispanic voters	21.6[65]	6	1
Ector	Black and Hispanic voters	21.9	4	1
Midland	Black and Hispanic voters	19.7	3	1

[63]The figures in the chart are drawn from the district court's findings set out in the District Court Opinion at [497a-501a].

[64]At the time this case was filed, there were thirty-six district court seats in Dallas County. In 1989 the Texas Legislature created a thirty-seventh district court in Dallas County. District Court Opinion at 16.

[65]In Lubbock, Ector, and Midland Counties the figures shown for minority voters as a percentage of voting age population are combined totals of black and Hispanic voters.

APPENDIX IV
Socio-Economic Disparities Between Minority and White Citizens[66]

County	Percent of Families Earning Less Than $20,000:	Percent of Families Below Poverty Line:	Percent Over Age 25 with College Degree:	Percent of Workforce Holding Managerial or Professional Position:
Bexar				
Whites	43.9	5.4	24.9	31.7
Hispanics	73.2	24.3	5.2	11.8
Dallas				
Whites	36.5	3.9	25.6	28.3
Blacks	68.2	21.2	9.2	11.1
Ector				
Whites	39.3	5.0	14.2	21.3
Blacks	73.5	30.6	6.1	10.6
Hispanics	67.6	18.3	2.8	6.9
Harris				
Whites	28.2	3.5	28.0	30.4
Blacks	62.0	19.5	11.7	13.1
Jefferson				
Whites	36.5	4.0	16.2	22.1
Blacks	67.6	26.4	6.2	10.7
Lubbock				
Whites	46.5	5.2	23.8	26.6
Blacks	74.6	26.8	6.7	10.6
Hispanics	77.9	23.7	4.2	7.8

[66]The statistics in this appendix were taken from the Plaintiffs' exhibits. They are based on the 1980 Census.

Midland				
Whites	31.1	3.3	28.3	31.7
Blacks	65.7	24.6	6.2	9.6
Hispanics	67.6	14.7	6.2	10.8
Tarrant				
Whites	40.0	4.2	20.3	25.3
Blacks	70.3	22.3	7.9	10.9

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting:

I

History will with the perspective of time mark the Voting Rights Act as the single most important act of government in the black civil rights movement since the Emancipation Proclamation and the Civil Rights Amendments. Its constitutionality was anchored in the explicit grants of power to the Congress of the Thirteenth, Fourteenth, and Fifteenth Amendments. At the same time the Voting Rights Act as the act of the representative branch stands on ground beyond the reach of the most dedicated process-oriented legal critics. Its mission was to deliver the constitutionally secured promise of power. Its result was more swift and immediately far-reaching than *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Its allocation of power found expression at every level. The story can be elaborated with reams of data and a library of events but its soaking penetration into the daily world of the black, and the southern black in particular is captured by two riveting scenes.

George Wallace campaigning in Alabama in 1963 told voters, "I draw the line in the dust and toss the gauntlet before the feet of tyranny, and I say: segregation now, segregation tomorrow, segregation forever." Within ten years Governor Wallace moved from his pugnacious stance in the door at the University of Alabama to the center of the playing field of Bryant-Denny Stadium crowning a black homecoming queen. It was simultaneously a trip of a

quarter of a mile and light years. Wallace's rhetoric of segregation now and forever gave way to "We're all God's children. All God's children are equal."

The Constitution allocates power and at every turn attempts to check its use. As wise as its diffusion has proved to be, our constitutional structure ultimately rests on the ballot box. The Voting Rights Act of 1965 built on this proven political theory by cutting at barriers to the opportunity to vote. The enfranchisement of protected minorities moved swiftly and the opportunity to vote quickly became a reality. Nonetheless many local political structures facilitated the perpetuation of old power, frustrating the leveraging power of voting minorities. Many white majorities were unable to jump traces that in combination with various election arrangements, such as at- large voting, facilitated the freezing of factions and left the white majority unchallenged and unresponsive. The fight to remove those structures that diluted the hard won votes of minorities encountered in 1980 the requirement that the structures be shown to have been adopted or perpetuated with the purpose of denying voting strength to minorities. The fight returned to the Congress resulting in the 1982 amendments to the Act, the interpretation of which today confounds this court. Before turning to these difficulties, one distraction must be laid aside.

I challenge the assertion that this court is somehow less devoted than in times past to the implementation of this congressional directive and the constitutional commands it implements. That assertion rests on a failure to appreciate the new claims now being pushed under the old clothing of the civil rights movement. The assertion exposes unawareness that this great surge in the effort to implement the political ideal that we are all the children of this political order has, perhaps inevitably, gathered the baggage of contentions that federal courts must not only strip away the effects of racial and ethnic discrimination but must now shelter the work of political parties and political coalitions that may today but not tomorrow offer aid to blacks and

Hispanics. It is here that I part company with my colleagues, a parting that leaves us far apart. The 1982 amendments reached to effects of racial discrimination; it did not and could not have dispensed with proof of race as a causative factor. As I will explain, the majority has read the Voting Rights Act as the protector of factions, not of protected racial minorities. It is wrong. By ignoring race the majority loses the moral force of the Civil Rights Amendments. More to the point it sorely taxes the constitutionality of the Act as the majority would apply it.

This insistence upon a tie to race received expression and effect in *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), and *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), as well as the decisions of this court. See, e.g., *Zimmer* v. *McKeithen*, 485 F.2d 1297 (1973), *aff'd sub nom East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976). The 1982 amendment's codification of the "results test" set out in Whitcomb and *White* ensured that the focus of § 2 would remain on those cases "where a combination of public activity and private discrimination have joined to make it virtually impossible for minorities to play a meaningful role in the electoral process." *Hearings on the Voting Rights Act Before the Subcom. on the Constitution of the Senate Comm. of the Judiciary*, 97th Cong., 2d Sess. 1367-68 (statement of Professor Drew Days) (emphasis added). The Supreme Court confirmed this understanding of the Act in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). There, Justice Brennan's attempt to sever the crucial link between alleged unequal opportunity and race was rebuffed by a majority of the Justices as a standard crafted to shield political minorities from the vicissitudes of "interest-group politics rather than a rule hedging against racial discrimination." *Gingles*, 478 U.S. at 83, 106 S.Ct. at 2782 (White, J., concurring); *id.* at 101, 101 S.Ct. at 2792 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring).

Similarly, the effects test that lies at the heart of

statutory anti- discrimination law has always contemplated that defendants may attempt to rebut a prima facie case of disparate impact by showing that the challenged practice promotes a substantial interest. This "balancing test," despite its indeterminacy, has been an integral part of Title VII cases and was expressly recognized in the context of § 2 in *Houston Lawyers' Ass'n v. Attorney General*, ___ U.S. ___, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991), where the Supreme Court held that the state's interest in maintaining its electoral scheme should be weighed against proven vote dilution. *Id.* ___ U.S. at ___, 111 S.Ct. at 2381. It is a direct draw upon equal protection constructs.

The district court did not apply these legal standards. To the contrary, the court held that the causes of divergent voting patterns, including the extraordinary explanatory power of partisan voting, were legally irrelevant. Not even the majority seriously defends the ruling of the district court that partisan voting is simply irrelevant. In Dallas County, for example, the Republican Party dominates judicial elections—black Republicans win and white Democrats lose. There are virtually no exceptions save the most recent elections in which a black Democratic appointee defeated a white Republican. But this bear in the plaintiff tent is to be ignored, I am told. This dependence upon a winning Republican Party for proof of bloc voting is an embarrassment to the findings of voting dilution in this case, unless it's the case that racial prejudice cements white majorities only in these nine counties and not in the Democratic strongholds of Texas. This alone highlights the failure of the plaintiffs' model to distinguish between bloc and party voting. Plaintiffs' and the majority's model produces a second perverse result. By the model as you proceed back in time there is less dilution of minority votes because with each step backward into Texas history the Democratic Party became stronger; the end of the closed Texas primaries would mark the absence of bloc voting.

All this comes from a majority willing to find a racial appeal in a Dallas County judicial race sufficient to warrant

changing the structure of all its courts from a report that state district court Judge Baraka was described as a Black Muslim. The majority fails to point out that Judge Baraka was elected with 61% of the white vote—and now serves on that court. In sum, the majority does not fairly deal with the facts and its view of partisan elections is not supported by the law. It equally defies common sense.

The district court also refused to consider the strong state interests advanced by Texas' method of electing its district judges. Unable to explain away the error in failing to apply governing law, the majority nonetheless, with one unsupportable exception, affirms the district court's holding in its entirety. It might fairly be asked how reversal or at least a remand might be avoided once an appellate court concludes that a district court's holding is rooted in a fundamental misapprehension of not one, but two foundational elements of § 2 jurisprudence. The majority accomplishes this surprising feat by nominally accepting the relevant Supreme Court decisions, but then misinterpreting and misapplying them so as to give this controlling authority no practical effect.

The majority's interpretation of cases directing courts to inquire into the causes of voting patterns renders these decisions, particularly *Whitcomb*, beyond recognition. Freed from the constraints of statute and precedent, Congress' powerful and distinct command forbidding any practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" is transformed in the imaginative hands of the majority into a "test" that establishes a violation of § 2 whenever "some mix of factors" discloses an undefined measure of unequal opportunity in a way that is somehow "linked to race or color." Majority op. at [223a]. The majority's avoidance of *Houston Lawyers'* is less inventive but no less effective. The court concedes that the state's interest must be weighed against vote dilution, but then dismisses Texas' interest in maintaining its electoral plan, one virtually as old as statehood, and one that several members of this

court, upon our earlier review, found so weighty as to preclude § 2 liability as a matter of law, as no more than "rational." We are bound to give Supreme Court decisions and the will of Congress their full effect. I dissent from today's refusal to do so.

II

The majority properly notes that a § 2 attack on an at-large system is governed by the framework established in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Under *Gingles*, a challenger of an at- large election scheme must demonstrate that (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) it is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. 478 U.S. at 48-51, 106 S.Ct. at 2765-67. Satisfaction of these three threshold factors is necessary but not sufficient to establish liability; plaintiffs must also show that, under the "totality of circumstances," they do not possess the same opportunities to participate in the political process enjoyed by other voters. The heart of my disagreement with the majority lies in its explication and application of the *Gingles* inquiry into white bloc voting and the closely related *Zimmer* factor directing courts to examine "the extent to which voting ... is racially polarized." S.Rep. 417 at 29, reprinted in 1982 U.S.Code Cong. & Admin.News at 206. According to the majority, causation has no role in examining divergent voting patterns; bloc voting exists whenever "whites and blacks vote differently." This approach is overly simplistic and in stark tension with § 2's express command that minority groups shall not be denied equal opportunity "on account of race or color." Contrary to the majority's contentions, Whitcomb, the text and legislative history of the 1982 amendments, *Gingles*, and the decisions of this circuit preclude a finding of racial bloc voting where divergent voting patterns are best explained by partisan affiliation.

In *Whitcomb*, black citizens residing in one part of Marion County, referred to as the "ghetto" by the Court,

claimed that the county's at-large method of electing members to the state legislature impermissibly diluted their votes. "Ghetto" residents "voted heavily Democratic," but since the county's white majority consistently voted Republican, their preferred candidates were defeated in four of the five elections between 1960 and 1968. 403 U.S. at 150, 91 S.Ct. at 1873. The *Whitcomb* Court recognized that the at-large electoral scheme caused the "voting power of ghetto residents [to be] 'cancelled out,' " *id.* at 153, 91 S.Ct. at 1874, but stated that this result by itself did not provide grounds for relief. Noting that blacks enjoyed full access to the political process, *id.* at 149-50, 91 S.Ct. at 1872-73, the Court reasoned that "had the Democrats won all of the elections or even most of them, the ghetto would have no justifiable complaints about representation." *Id.* at 152, 91 S.Ct. at 1873. For this reason, the Court concluded that the "failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes." *Id.* at 153, 91 S.Ct. at 1874.

The *Whitcomb* Court was reluctant to view the plaintiffs' claims of vote dilution as anything more than "a euphemism for political defeat at the polls," *id.*, for, absent evidence of a lack of access to the political system, there was no principle by which the Court could distinguish the "ghetto's" claims and those of other unsuccessful political groups:

> [A]re poor Negroes of the ghetto any more underrepresented than poor ghetto whites who also voted Democratic and lost, or any more discriminated against than other interest groups or voters in Marion County with allegiance to the Democratic Party, or, conversely, any less represented than Republican areas or voters in years of Republican defeat? We think not. The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this

> segment of the population is being denied access to the political system. *Id.* at 154-55, 91 S.Ct. at 1874-75. To grant relief to black residents in this case "would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a multi-member district vote."

Id. at 156, 91 S.Ct. at 1876.

As the Seventh Circuit recently observed, § 2 is "a balm for racial minorities, not political ones—even though the two often coincide." *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir.1992) (citing *Whitcomb*). Black Democrats are entitled to relief when their defeats at the polls are attributable to their race, but not when such losses are due to their party. The majority rejects the rule established in *Whitcomb* and its opinion is replete with assertions that any suggestion that evidence of partisan voting might be introduced to explain divergent voting patterns is presumptively inconsistent with § 2's focus on "results." See, e.g., Majority op. at 748; see also Richard L. Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 How.L.J. 495, 498 (1985). The relevant authorities, however, indicate that *Whitcomb*'s causation analysis is entirely consistent with an approach that looks not to "intent," but "effects." In *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), for example, the plurality's assertions that *Whitcomb* had required a showing of intent, see *id.* at 66, 70, 100 S.Ct. at 1499, 1501, prompted Justice Marshall in dissent to explain the decision:

> In *Whitcomb* v. Chavis, we again repeated and applied the *Fortson* [*v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965)] [effects] standard, *but determined that the Negro community's lack of success at the polls was the result of partisan politics, not racial vote dilution.* The Court stressed that both the Democratic and Republican

> Parties had nominated Negroes and several had been elected. *Negro candidates lost only when their entire party slate went down to defeat.* In addition, the Court was impressed that there was no finding that officials had been unresponsive to Negro concerns.

Id. at 109, 100 S.Ct. at 1522 (Marshall, J., dissenting) (emphasis added) (citations omitted). The Senate Report agreed with Justice Marshall that *Whitcomb* had employed an effects test and echoed his emphasis in presenting what it understood to be the kernel of the decision:

> The failure of the ghetto to have legislative seats in proportion to its population emerges *more as a function of losing elections than of built-in bias against poor Negroes.* The voting power of ghetto residents may have been "cancelled out," as the district court held, but this seems a mere euphemism for political defeat at the polls.

S.Rep. 417 at 21 (quoting *Whitcomb*, 403 U.S. at 153, 91 S.Ct. at 1874) (emphasis added), *reprinted in* 1982 U.S.Code Cong. & Admin.News at 198. These references to the "lack of success at the polls" as a "result" or "function" of "partisan politics," not "racial vote dilution" or "built-in bias against poor Negroes," only confirm *Whitcomb* 's central meaning: where black Democrats lose not because they are black, but because they are Democrats, or, put another way, where black Republicans win and white Democrats lose, there can be no finding of illegal vote dilution.

The majority offers a very different reading of *Whitcomb*. According to the majority, this case stands for a very narrow proposition: "Where there is evidence of partisan voting or interest group politics *and no evidence* that members of the minority group have an unequal opportunity to participate in the political process on account of race or color, the minority group's vote dilution claim will fail." Majority op. at [356a] (emphasis in original). Stated in this manner, *Whitcomb* presents no obstacle to liability in this case, for here there is "substantial evidence that minority voters in those counties have an unequal opportunity to participate in the political process on account of race." *Id.* at 811.

This reading renders *Whitcomb* nonsensical. The majority would have the decision stand for the following proposition: "Where there is evidence of partisan voting and no evidence of vote dilution, the minority's vote dilution claim will fail." This odd result is accomplished through a bit of anachronistic wordplay, as the majority infuses one of the Court's subsidiary findings with the import it would have under the amended § 2. The majority quotes the *Whitcomb* Court's statement that black voters could not prevail "'absent evidence and findings that [black] residents had less opportunity than did other Marion County residents to participate in the political process and elect legislators of their choice.' " Majority op. at [354a] (quoting *Whitcomb*, 403 U.S. at 149, 91 S.Ct. at 1872). The language used by the Court here was of course codified by the 1982 amendments, and today constitutes the ultimate showing of vote dilution necessary to make out a violation of § 2. The *Whitcomb* Court had something very different in mind, however, as the text immediately following this statement discloses:

> We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.

Id. at 149-50, 91 S.Ct. at 1872-73. This evidence of an equal "opportunity ... to participate in the political process and elect legislators of their choice" pertains solely to formal barriers to political participation, and is examined under "*Zimmer*" factors today. As such, it is, contrary to the majority's contentions, quite remote from anything resembling an ultimate finding of nondilution.

The flaws in the majority's reading of *Whitcomb* become even more pronounced when it attempts to distinguish this

decision from the instant case. Recall that *Whitcomb* "held" that a minority group's vote dilution claim will fail "[w]here there is evidence of partisan voting or interest group politics *and no evidence* that members of the minority group have an unequal opportunity to participate in the political process on account of race or color." Majority op. at [356a](emphasis in original). The majority concludes from this that "*Whitcomb* does not preclude a finding of vote dilution" in this case because there is "substantial evidence that minority voters in those counties have an unequal opportunity to participate in the political process on account of their race or color." Majority op. at [360a]. In these counties there is [1] evidence of a history of discrimination against minorities that violated their rights to participate in the political process, [2] evidence of strong to severe racially polarized voting, [3] evidence that minorities continue to bear the effects of past discrimination, and [4] evidence that minority candidates, especially those who are sponsored by the minority community, are unsuccessful in their bids to hold offices like the district court bench. *Id.* at [360a-361a]. The difficulty is that all of these circumstances constituting "substantial evidence" of unequal opportunity were present to an equal or greater extent in *Whitcomb*, a case in which, according to the majority, there was "no evidence." A comparison of the two cases both confirms the contrived nature of the majority's interpretation of *Whitcomb* and discloses the utter meaninglessness of the court's "findings."

First, with respect to the effects of past discrimination, the *Whitcomb* Court did not dispute the district court's findings that "[s]trong differences" between "ghetto" residents and the adjacent communities "were found in terms of housing conditions, income and educational levels, rates of unemployment, juvenile crime, and welfare assistance." 403 U.S. at 132, 91 S.Ct. at 1863. Moreover, in contrast to the district court's "inquiry" into the effects of past discrimination in this case, which even the majority concedes amounted to no more than the taking of "judicial notice," majority op. at 772, the lower court findings before the

Whitcomb Court were the product of careful and detailed analysis. See *Chavis v. Whitcomb*, 305 F.Supp. 1364, 1376-81 (S.D.Ind.1969). Second, the presence of "polarized voting" does not distinguish this case, for the evidence in *Whitcomb* indicated that the "ghetto" voted overwhelmingly Democratic while white voters consistently supported Republicans. *See Whitcomb*, 403 U.S. at 149-53, 91 S.Ct. at 1872- 74.[1] Finally, the record in *Whitcomb* discloses that the "ghetto" was less successful than the minority groups in several of the counties here in electing minority candidates. "Ghetto" residents totaled nearly 18% of the Marion County population and were elected to 4.75% of the Senate seats and 5.97% of the Assembly seats during the relevant time period. See *Whitcomb*, 403 U.S. at 164, 91 S.Ct. at 1880 (appendix). This level of success is comparable to minority candidates' election rate in several of the counties in which the majority

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[1]The majority suggests that a "straightforward reading" of *Whitcomb* discloses that polarized voting was not present in the case. As far as I can tell, this "straightforward reading" has managed to elude all of the decision's previous readers, including *Whitcomb*'s author, *see Thornburg v. Gingles*, 478 U.S. 30, 83, 106 S.Ct. 2752, 2783, 92 L.Ed.2d 25 (1986) (White, J., concurring) (the notion that "there is polarized voting if the majority of white voters vote for different candidates than the majority of blacks, regardless of the race of the candidates.... seems quite at odds with the discussion in [*Whitcomb*]"), this court, *see Jones v. City of Lubbock*, 727 F.2d 364, 384 (5th Cir.1984) ("Even where an at-large system interacts with a racially or ethnically polarized electorate to the disadvantage of the minority, the 'result' is not necessarily a denial of political access.... [T]he 'result' in *Whitcomb* [is] that polarized voting does not render an at-large system dilutive of minority voting strength"), and our leading commentators. *See, e.g.*, Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 Va.L.Rev. 1, 22 n. 78 (1991). It is worth noting that Justice Brennan's argument in *Gingles* that causation has no role in examining polarized voting, the position the majority adopts today, did not include a citation, let alone a discussion, of *Whitcomb*. *See Gingles*, 478 U.S. at 61-74, 106 S.Ct. at 2771-78.

finds a violation of § 2, such as Tarrant County (11.8% black population, 8.7-13.1% of judges), Bexar County (46.6% Hispanic population, 15.8-31.6% of judges), Dallas County (18.5% black population, 8.3% of judges), and Harris County (19.7% black population, 5.1% of judges). Here again, the proof of this factor is if anything more compelling in *Whitcomb*, for unlike judicial elections in which only lawyers are eligible, there are no demanding prerequisites for citizens wishing to run for state legislature.[2]

In sum, were facts identical to those present in *Whitcomb* before the court today, the majority's analysis would compel it to find, in direct contradiction with the Supreme Court's holding, illegal vote dilution. The obvious impermissibility of this result makes a mockery of its announcement, apparently offered in all seriousness, that "we decline to redefine the concept of racially polarized voting to include a causation element." Majority op. at 748. An inquiry into whether divergent voting patterns are attributable to partisan voting does not involve a "redefin[ition]" of a "concept," but the application of binding Supreme Court precedent. Further, that this court would find "substantial evidence" of unequal opportunity on the same record in which the Supreme Court, according to the majority, found "no evidence" demonstrates just how far we have strayed in examining the other elements of a voting rights claim. *Whitcomb* dictates that no dilution should be found where polarized voting is the product of partisan politics, even where a minority group suffers from the lingering effects of past discrimination and the percentage of minority officeholders does not mirror the group's population.

The majority strenuously resists both the general

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[2]As I explain in the attached opinion, the requirement of bar membership for district judges makes the number of minority lawyers, not the general minority population, the most probative baseline for gauging electoral success. *See Southern Christian Leadership Conf. of Ala. v. Evans*, 785 F.Supp. 1469, 1476-77 (M.D.Ala.1992).

applicability of *Whitcomb* and the particular conclusion that an application of the approach it employs today to the facts of that case would require us to find illegal vote dilution. The court contends that "*Whitcomb* must be read in the context of the community in which the vote dilution claim was being brought." Majority op. at [357a]. The "context" of *Whitcomb* differs from the record before us, according to the majority, in two respects. The plaintiffs in *Whitcomb*, unlike the plaintiffs in this case, did not present evidence (1) of "a history of official discrimination touching the rights of Blacks to vote and participate in the political process" and (2) "that the socioeconomic disparities from which they suffered were the result of, or on account of, race or color." Majority op. at [358a].

The majority's attempt to distinguish *Whitcomb* on these grounds is wholly unpersuasive. This argument does provide, however, an ample demonstration of the literally dispositive weight the court attaches to the two *Zimmer* factors pertaining to the effects of discrimination. In the first instance, the majority offers no reasons in support of its contention that *Whitcomb* must be read "in context." The *Whitcomb* Court itself certainly gave no indications that its analysis of vote dilution, particularly its emphasis on the role of partisan voting, was somehow tied to the immediate facts of the case or otherwise inapplicable to cases in which there is evidence of discrimination with respect to voting. In addition, there are no suggestions in either the Senate Report or *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), that *Whitcomb* should be limited in the manner proposed by the majority. *Gingles* is especially relevant, given that the Court had before it a § 2 claim arising in North Carolina, a state which of course shares much of Texas' tragic history of discrimination. To the extent that the court's limited reading of *Whitcomb* rests on the perceived importance of the effects of discrimination, the rejection of this interpretation by the relevant authorities discloses that the court has grossly overestimated the significance of these factors.

Moreover, even if the *Zimmer* factors concerning the effects of past discrimination could bear the dispositive weight the court imposes, the lack of evidence relating to these effects in this case precludes the court from distinguishing *Whitcomb*. Recall that *Whitcomb* differs from this case because of an absence of evidence (1) of "a history of official discrimination touching the rights of Blacks to vote and participate in the political process" and (2) "that the socioeconomic disparities from which they suffered were the result of, or on account of, race or color." Majority op. at 810. The second part of this statement is not accurate, for residents of the "ghetto," like many of the minority voters in this case, were victims of discrimination in education and housing, as a 1971 decision finding de jure segregation in the Indianapolis public schools indicates. *See United States v. Board of School Commissioners*, 332 F.Supp. 655 (S.D.Ind.1971). Thus, the two cases are distinguishable only by Texas' history of voting discrimination. The difficulty with the majority's reliance on this factor, however, is that there is no evidence in the record that this history has any present-day effects in seven of the eight counties in which the court finds § 2 liability. The majority concedes that plaintiffs have failed to show that black citizens register to vote at a lower rate than whites, the typical way in which this *Zimmer* factor is established, *see, e.g.*, *Gingles*, 478 U.S. at 39, 106 S.Ct. at 2760, and instead purports to rely on the paucity of minority lawyers as proof. But this lack of minority lawyers is attributable, as the court's citation of *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950), suggests, to discrimination in education, not voting. Since Marion County and Texas have this unfortunate history of segregated education in common, the majority's attempt to distinguish *Whitcomb* ultimately fails.

As I explain in more detail in the attached opinion, *Whitcomb* precludes a finding of vote dilution in most, but not all, of the counties at issue. The only possible justification for the majority's failure to give the decision full force in this case is that *Whitcomb* enjoys lesser significance

under the amended § 2. The majority in fact makes a brief attempt to slight the decision's importance, suggesting only that *Whitcomb* "continues to have relevance under the amended Section 2." Majority op. at [354a]. But the very passages in the Senate Report the court cites explicitly state that the 1982 amendment is intended to codify the results test as employed in *Whitcomb* and *White*. *See* S.Rep. 417 at 20-23, 32-33, *reprinted* in 1982 U.S.Code Cong. & Admin.News at 197-201, 210-11; see also Jones, 727 F.2d at 379 (the amended § 2 "codifies pre-Bolden voting dilution law"). A review of the text and legislative history of the 1982 amendment and *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), confirms this legislative intent.

Whitcomb 's teaching that illegal vote dilution does not lie where the inability of minority groups to elect candidates of their choice is the product of partisan voting—where black Republicans win and white Democrats lose—is reflected in the text of amended § 2 itself. Plaintiffs may establish a violation of § 2 by proving that members of a minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The statute then singles out "[t]he extent to which members of a protected class have been elected to office in the state or political subdivision [as] one circumstance which may considered." *Id.* This express reference to the success of minority candidates led the *Gingles* Court to cite this factor along with racial bloc voting as most probative of illegal vote dilution. 478 U.S. at 48 n. 15, 106 S.Ct. at 2765 n. 15.

The influence of *Whitcomb* is evident in Congress' provision of "[t]he extent to which members of a protected class have been elected," rather than the extent to which members of a minority group have "elect[ed] representatives of their choice," as the yardstick for minority electoral success. The minority-preferred candidate will not always be a minority herself, and successful minority candidates will not always have the support of minority voters. The

distinction between the two terms contained in § 2 loses its significance only in cases where race is the primary determinant of voter behavior, as the white majority's refusal to vote for minority candidates ensures they will be elected only with the support of minority voters, if at all. By contrast, where, as here, party affiliation best explains voting patterns, Congress' decision to confine the inquiry into electoral success to whether "members of a protected class have been elected" becomes quite relevant. In order to establish this crucial element in their vote dilution claim, plaintiffs must show not that the white majority does not support minority-preferred candidates, but that whites do not vote for minority candidates. Simply put, it is quite possible that minority plaintiffs will be unable to demonstrate a relevant lack of electoral success as part of the "totality of circumstances" inquiry even where few, if any, minority-preferred candidates have been elected, as in the case, for example, where black Republicans win and white Democrats lose. Section 2 thus preserves *Whitcomb*'s sharp distinction between cases of illegal vote dilution and those instances in which the "cancell[ing] out" of a minority group's "voting power" constitutes no more than a "political defeat at the polls." *Whitcomb*, 403 U.S. at 153, 91 S.Ct. at 1874.

This interpretation of § 2 of course presumes that Congress intended to convey legal meaning through the use of two distinct phrases, that it did not use "members of the protected class" and "representatives of [the minority group's] choice" synonymously on the assumption that whites will only support white candidates and minorities will only support minority candidates. In *Gingles*, however, Justice Brennan proposed this contrary reading of § 2 in contending, as the majority does here, see, e.g., majority op. at [220a], that the focus of a court's inquiry into electoral success should remain on whether members of a minority group are able to "elect representatives of their choice." *Gingles*, 478 U.S. at 67-68, 106 S.Ct. at 2774-75 (emphasis in original). Justice Brennan maintained that "[u]nder § 2, it

is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important." *Id.* (emphasis in original). The obvious difficulty with this position is that § 2's explicit reference to "members of a protected class" would seem to make the race of the candidate, not the source of her support, the significant factor in gauging electoral success. Justice Brennan attempted to ease this tension by intimating that "members of a protected class" should be read "representatives of [the minority group's] choice." After noting that "it will frequently be the case that a black candidate is the choice of blacks, while a white candidates is the choice of whites," he explained that this "tendency" made it "convenien[t]" for him to follow the district court in "refer[ring] to the preferred representative of black voters as the 'black candidate' and to the preferred representative of white voters as the 'white representative.' " *Id.* Given that Congress no doubt had the opportunity to observe this same "tendency" among voters, is it unreasonable to believe that it employed the same background assumption in drafting § 2? Regardless, Justice Brennan concluded, contrary to the text of the statute, that "the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry." *Id.*

The Senate Report, however, expressly disclaimed any reliance on a purported correlation between the race of the voter and the candidate. The Senate Subcommittee on the Constitution's Report charged the authors of the amended statute with proceeding under the same assumption attributed to them by Justice Brennan, "that race is the predominant determinant of political preference ... [and] that blacks will only vote for black candidates and whites only for white candidates." S.Rep. 417 at 107, 148 (Report of the Subcommittee on the Constitution), *reprinted* in 1982 U.S.Code Cong. & Admin.News at 278, 321. Rather than disclose its adoption of this assumption or dismiss the asserted tendency among white voters to vote only for white candidates as "not directly pertinent to a § 2 inquiry," as

Justice Brennan's analysis might have suggested, the Senate Report cited such incidents of "racial politics" as the harm § 2 was intended to remedy: "Unfortunately ... there still are some communities in our Nation where racial politics do dominate the electoral process. In the context of such racial bloc voting, and other factors, a particular election method can deny minority voters equal opportunity to participate meaningfully in elections." *Id.* at 33, reprinted in U.S.Code Cong. & Admin.News at 211. The Senate Report continued:

> The results test *makes no assumptions one way or the other* about the role of racial political considerations in a particular community. If plaintiffs assert that they are denied fair access to the political process, in part, because of the racial bloc voting context within which the challenged election system works, they would have to prove it.

Id. at 34 (emphasis in original), *reprinted in* U.S.Code Cong. & Admin.News at 212.

Far from assuming a tendency among white voters to vote for white candidates in drafting the statute, Congress identified such "racial political considerations" as the linchpin of a successful vote dilution claim. We have no license to amend § 2, as the majority would do here, by analyzing the electoral success of "members of a protected class" through a "representatives of [the minority group's] choice" filter, with the success of minority candidates not supported by the minority group being discounted accordingly. Evidence of the electoral success of minority candidates should not, of course, be accepted uncritically, but the Senate Report, consistent with the text of § 2, expressly limits the scope of our inquiry in cautioning that the

> election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote," in violation of this section. *Zimmer*, 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section e.g., by manipulating the election of a "safe" minority candidate. "Were we to hold that a minority candidate's success at the polls is

> conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution ... Instead we shall continue to require an independent consideration of the record." *Ibid.*

Id. at 29 n. 115, reprinted in 1982 U.S.Code Cong. & Admin.News at 207 n. 115. This passage does not suggest that courts should depreciate the success of minority candidates elected without widespread support from minority groups, as the majority might have it. The concern that the election of a "'safe' minority candidate" might facilitate an evasion of § 2 is a function of the number of candidates, not the source of their support. The election of several, rather than few, minorities precludes an inference that the process has somehow been manipulated. In any event, the record in this case discloses that Republicans have in no way attempted to limit their ticket to minority candidates adjudged to be "safe." Plaintiff-intervenors Oliver, Tinsley, and White, for example, all of whom ran unsuccessfully as Democrats, testified that they were heavily lobbied by the Dallas Republican Party to run as Republicans. White in fact acknowledged what the majority has refused to recognize in this case, that "if I ran as a Republican ... the likelihood is that I would win."

Section 2 provides that plaintiffs' proof of a lack of electoral success turns solely on the election rate of "members of a protected class" without regard to whether these individuals are "representatives of [the minority group's] choice." Since the support of the majority of white voters will ensure victory in most communities, the statute, in so limiting our inquiry, requires plaintiffs seeking to demonstrate a lack of electoral success to establish that white voters do not vote for minority candidates. This principle seems sensible, for the willingness of whites to support minority candidates tends to negate any inference that their failure to give their votes to minority- preferred candidates, regardless of color, is attributable to race. As such, the losses of minority-preferred candidates in these

instances are best explained by political, rather than racial, differences.[3]

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[3]The majority misunderstands my argument on this score. It first maintains that I contend that the extent to which minority candidates have been elected should somehow take precedence over the ultimate question in § 2 cases—whether a minority group has an equal opportunity to elect representatives of their choice. Majority op. at [236a n9]. This distortion provides the foundation for the claim that I urge that the election of " 'several' ... Republican minority candidates, candidates who were not even supported by the minority community, indicates as a matter of law that minorities have an equal opportunity to elect representatives of their choice." Majority op. at [238a n10]. Contrary to these imputations, the discussion in the text suggests nothing of the sort.

The *Whitcomb* Court made plain that evidence that a minority group's "voting power" has been "cancelled out," is not enough, by itself, to establish liability. Courts must also determine whether these political defeats are "a function of losing elections" or "built-in bias," or, to use Justice Marshall's words, whether a minority group's "lack of success at the polls was the result of partisan politics [or] racial vote dilution." *Mobile v. Bolden*, 446 U.S. 55, 109, 100 S.Ct. 1490, 1522, 64 L.Ed.2d 47 (1980) (Marshall, J., dissenting). One of the purposes behind my analysis is to test the majority's implicit argument that the 1982 amendments, despite Congress' express intent to "codify" *Whitcomb*, abandoned this crucial distinction. I submit that the language of § 2 provides strong indications that they did not.

Congress would have taken great strides toward enacting the majority's understanding of the Voting Rights Act had it stated that a violation of § 2 is established where members of a minority group "have less opportunity ... to elect representatives of their choice. The extent to which representatives of a minority group's choice have been elected ... is one circumstance which may be considered." Under such a statute, a legally relevant lack of electoral success would be established upon a showing that minority group voters had lost more elections than other members of the electorate; the success of minority candidates who did not receive decisive support from minority voters would be irrelevant. In the context of the inquiry into electoral success, *Whitcomb* 's distinction between partisan politics and illegal vote dilution would have been erased.

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Viewed in this manner, I believe that Congress' decision to establish "[t]he extent to which members of a protected class have been elected" as the measure of legally relevant electoral success is significant. This formulation does not equate political defeat with a probative lack of electoral success, for "members of a protected class" will not always be "representatives of [a minority group's] choice," and vice versa. A minority group's ability consistently "to elect representatives of their choice" is not necessarily proof of electoral success within the meaning of § 2, just as an inability "to elect representatives of their choice" does not preclude a showing of legally relevant electoral success. Since electoral success is to be gauged without regard to the presence or absence of minority voter support for successful minority candidates, it is quite possible that minority plaintiffs would not be able to establish this element in their vote dilution claim even though they have had little or no success in electing "representatives of their choice." The reason why such a result might have been acceptable to Congress is that such evidence would indicate widespread support among white voters for minority candidates, which in turn would suggest that the reluctance of whites to support minority-preferred candidates was attributable to factors other than race, such as partisan affiliation. The minority group's electoral losses in this instance would be most properly viewed as the result of "partisan politics, not racial vote dilution."

Contrary to the majority's contentions, I am not seeking to displace the ultimate § 2 inquiry into whether plaintiffs "have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice" with this important, but subsidiary examination of electoral success. I would submit that it is the court, by discounting the success of minority candidates who were not preferred by minority voters, that has confused these terms. Similarly, nothing I have said suggests that I would find the success of minority candidates in this case to preclude all vote dilution claims "as a matter of law." My discussion of the significance of "several" rather than "few" minority officeholders pertains not to the case at bar, but is meant to illustrate that Senate's concern with the possible "manipulation" of the process to elect a "safe" minority candidate is a function of number, not, as the majority contends, the relative absence of minority voter support. I refer in this instance specifically to the Dallas Republican Party's lobbying of

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It would seem anomalous for our inquiry into racial bloc voting, the other crucial element of a vote dilution claim identified by the *Gingles* Court, to be governed by different principles. Plaintiffs may establish this factor by demonstrating "that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766-67. As discussed above, § 2's provision of the race of the candidates, not their status as the choice of the minority group, as the relevant factor in measuring electoral success will often preclude plaintiffs from establishing legally relevant electoral losses where these defeats are attributable to partisan differences. A consideration of the race of the candidate in examining racial bloc voting leads to a similar and, I would submit, proper result.

The role of the candidate's race in assessing racial bloc voting formed the basis of the fundamental disagreement among the Justices in *Gingles*. Justice Brennan advanced the textual argument discussed above as part of his claim that "[u]nder § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important." *Id.* at 68, 106 S.Ct. at 2775 (emphasis in original). Justice Brennan's assertion that the race of the candidate was irrelevant in examining racial bloc voting, however, was squarely rejected by five Justices in *Gingles*. 478 U.S. at 83, 106 S.Ct. at 2783 (White, J., concurring); *Id.* at 100-01, 106 S.Ct. at 2792-93 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring). Justice White argued that

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unsuccessful black Democratic candidates only because the majority's treatment of black Republicans' success in Dallas constitutes the most prominent example of its refusal, contrary to § 2, to distinguish legally relevant electoral success and the success of minority voters in electing representatives of their choice, a refusal that is intimately linked to the court's inability to distinguish "defeat at the polls" and "illegal vote dilution."

> Justice Brennan states in Part III-C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. *Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree.* Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under Justice Brennan's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominately black areas vote Democratic.... *This is interest-group politics rather than a rule hedging against racial discrimination.* I doubt that this is what Congress had in mind in amending § 2 as it did, and it seems quite at odds with the discussion in *Whitcomb v. Chavis*, 403 U.S. 124, 149-160, 91 S.Ct. 1858, 1872-78, 29 L.Ed.2d 363 (1971).

Id. 478 U.S. at 83, 106 S.Ct. at 2783 (White, J., concurring) (emphasis added). Justice O'Connor joined Justice White in maintaining that evidence that white and minority voters generally supported different candidates did not constitute legally significant racial bloc voting where these patterns were attributable to partisan affiliation rather than the race of the candidate. She therefore rejected Justice Brennan's position that

> evidence that the divergent racial voting patterns may be explained in part *by causes other than race, such as an underlying divergence in the interests of minority and white voters*.... can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group

would seem clearly relevant in answering the question whether *bloc voting by white voters will consistently defeat minority candidates.* Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge. Indeed, the Senate Report clearly stated that one factor that could have probative value in § 2 cases was "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S.Rep., at 29. The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on "intensive racial politics," on "racial political considerations," and on whether "racial politics ... dominate the electoral process" as one aspect of the "*racial bloc voting*" that Congress deemed relevant to showing a § 2 violation. *Id.*, at 33-34. *Similarly, I agree with Justice White that Justice Brennan's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with Whitcomb* and is not necessary to the disposition of this case. *Ante*, [478 U.S.] at 83 [106 S.Ct. at 2783] (concurring).

Id. at 100-01, 106 S.Ct. at 2792 (O'Connor, J., concurring) (emphasis added).

The majority here nonetheless adheres to Justice Brennan's position that causation is irrelevant in determining whether racial bloc voting exists. Evidence of racial considerations is acknowledged only as an "other" factor to be taken into account under the totality of circumstances: "After all, as Justice O'Connor recognized in her *Gingles* concurrence, the Senate Report accompanying the amendment to § 2 repeatedly emphasizes the relevance of 'racial politics' and 'racial political considerations' to the vote dilution inquiry." Majority op. at [242a] (citing *Gingles*, 478 U.S. at 101, 106 S.Ct. at 2792-93). The court does not quote Justice O'Connor directly, and in the very passage cited she asserts that a rule precluding consideration of "all evidence of voting patterns ... would give no effect whatever to the Senate Report's repeated emphasis on 'intensive racial politics,' on 'racial political considerations,' and on whether 'racial politics ... dominate the electoral process' as *one aspect of the 'racial bloc voting'* that Congress deemed relevant to showing a § 2 violation." *Gingles*, at 101, 106 S.Ct. at 2792 (quoting S.Rep. at 33-34) (emphasis added); see also *id.* at 83, 106 S.Ct. at 2783 (White, J., concurring) ("Under [Justice Brennan's] test, there is *polarized voting* if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree.") (emphasis added). Far from being an "other" factor of which the Senate made no mention, the extent to which voting patterns are attributable to causes other than race is an integral part of the inquiry into racial bloc voting, as five Justices in *Gingles* expressly held. The majority's failure to treat it as such is unjustified.[4]

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[4]In defending its decision to ignore causation and confine its bloc voting inquiry to the single question of whether "whites and blacks vote differently," the majority seizes upon Justice O'Connor's suggestion in *Gingles* that the causes of voting patterns also have probative value in assessing the responsiveness of elected officials,

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one of the factors considered as part of the "totality of circumstances." *See* Majority op. at [225a n6]. It is not, however, an either/or proposition, with causation being relevant to one element of the vote dilution inquiry but not another. In addition to bloc voting, Justice O'Connor believed that the explanations of voting patterns were "also" relevant in determining whether "candidates elected without decisive minority support would be willing to take the minority's interests into account." *Gingles*, 478 U.S. at 100, 106 S.Ct. at 2792 (O'Connor, J., concurring). In linking racial bloc voting and official unresponsiveness in this manner, Justice O'Connor was merely repeating an observation made in *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982), where the Court, like Justice O'Connor, identified bloc voting as the tendency to support candidates on the basis of race: "Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and *without bloc voting the minority candidates would not lose elections solely because of their race.*" *Id.* at 623, 102 S.Ct. at 3279 (emphasis added).

As Justice O'Connor suggested, a minority group's prospects for future electoral success and the likelihood that elected officials will take account of their interests differ materially "in a community where racial animosity is absent although the interests of racial groups diverge." *Gingles*, 478 U.S. at 100, 106 S.Ct. at 2792. A tendency among whites to cast their votes on the basis of race presents a far more durable obstacle to the coalition-building upon which minority electoral success depends than disagreements over ideology, for, as Professor Ely observes, "prejudice blinds us to overlapping interests that in fact exist." John Hart Ely, *Democracy and Distrust* 153 (1980). Where, on the other hand, voting patterns correlate with partisan affiliation or perceived interest, the open channels of communication facilitate a recognition of points of common ground that might otherwise go undetected. Elected officials in these communities cannot ignore minority interests because this group might be part of the winning coalition that votes them out of office. Given that the divergent voting patterns in this case are in most instances attributable to partisan affiliation rather than race, it is thus far from coincidental that the district court found no evidence of unresponsiveness on the part of elected officials in any

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As the Seventh Circuit recently noted in *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357 (7th Cir.1992), the agreement between Justice O'Connor and Justice White that a "system leading to the election of Black Republicans could not be dismissed as discriminatory" confirms the teaching of *Whitcomb*: "The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates." *Id.* at 361. In most areas where voting patterns are best explained by partisan affiliation, evidence that a majority of whites support one party will necessarily lead to the election of several minority candidates. (The contrary result might give rise to an inference that minorities did not enjoy full access to the party's slating process). Thus, Justice White and Justice O'Connor specifically charged that it was Justice Brennan's refusal to consider the race of the candidates that was inconsistent with *Whitcomb*. See *Gingles*, 478 U.S. at 101, 106 S.Ct. at 2792-93 (O'Connor, J., concurring) ("I agree with Justice White that Justice Brennan's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with *Whitcomb* ").

This close tie between a consideration of the race of the candidates and an inquiry into the causes of a minority-preferred candidate's defeat poses additional problems for the majority's rejection of causation, for even the majority must acknowledge that this Circuit has sided with Justice White and Justice O'Connor against Justice Brennan in regarding those elections pitting minority candidates against white candidates as the most probative of bloc voting. See, e.g., *Citizens for a Better Gretna v. City of*

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of the contested counties. The irony, of course, is that the proposed subdistricting remedy provides most judges with the same opportunity to ignore minority voters' interests without fear of political reprisal they would possess if elections were in fact dominated by racial bloc voting.

Gretna, 834 F.2d 496, 503-04 (5th Cir.1987). This leaves the majority in the untenable position of simultaneously maintaining that the race of the candidate is relevant but evidence of partisan voting is not. As *Whitcomb* and the various opinions in *Gingles* demonstrate, a consideration of the race of the candidate is necessarily related to examination of the reasons for white voters' reluctance to support the minority-preferred candidate. Thus, in holding that the races in which a member of a minority group runs against a white candidate are most probative of racial bloc voting, the *Gretna* court cited the same "concerns about the dangers in advancing interest group politics or enforcing proportional representation," 834 F.2d at 503 (footnote omitted), identified by Justice O'Connor and Justice White as reasons for examining causation. The majority's sole response to this analysis is the assertion that "we have never held or suggested ... that for white bloc voting to be significant, it must be motivated by racial animus." Majority op. at 747 (citing *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1118-1120 (5th Cir.1991)). This single citation offers no support for this proposition, as we expressly noted in Westwego that "no non-racial explanation for the correlation between race and the selection of candidates has been offered." *Id.* at 1119 n. 14.

In sum, the majority's failure to consider partisan affiliation as an explanation of divergent voting patterns is in flagrant contradiction with § 2 and the relevant Supreme Court and Fifth Circuit precedents. These authorities have established § 2 as "a balm for racial minorities, not political ones—even though the two often coincide." *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir.1992) (citing *Whitcomb*). The majority appears to challenge this distinction between race and party, suggesting in various places that the Republican and Democratic Parties are mere proxies for racial and ethnic groups in Texas. In this view, the difference between supporting candidates on the basis of partisan affiliation rather than race is insignificant, for a Republican vote is a vote for

whites and against minorities. I agree with the majority that courts should remain sensitive to this question, and should not be quick to dismiss plaintiffs' vote dilution claims in cases where divergent voting patterns correlate with partisan affiliation as "political defeats" not cognizable under § 2.

Here, the majority in effect treats party as a proxy for race by refusing to acknowledge the distinction between "partisan politics" and "racial vote dilution" that lies at the heart of § 2. My refusal to join the majority in equating race and party on the record before us is rooted in two considerations. First, white voters constitute the majority of not only the Republican Party, but also the Democratic Party, in several of the counties at issue. Even in those areas where the Republican Party is strongest, in Dallas County, for example, 30-40% of white voters consistently support Democrats, making white Democrats more numerous than all of the minority Democratic voters combined. These white Democrats have in recent years experienced the same electoral defeats as minority voters. If we are to hold, as the majority in effect does today, that these losses at the polls, without more, give rise to a racial vote dilution claim warranting special relief for minority voters, a principle by which we might justify withholding similar relief from white Democrats is not readily apparent.

I am also reluctant to treat party as a proxy for race in this case because a white partisan voter found herself not infrequently supporting a minority candidate rather than his white opponent. The undisputed evidence discloses that white voters in most counties, both Republican and Democratic, without fail supported the minority candidates on their party's ticket at levels equal to or greater than those enjoyed by white candidates, even where the minority candidate was opposed by a white candidate. In Dallas County, for example, Judge Wright received the greatest recorded percentage of the white vote (77%) in her race against a white Democrat. To conclude on this record that political parties serve as proxies for race is simply unwarranted. Because the evidence in most instances

unmistakably shows that divergent voting patterns among white and minority voters are best explained by partisan affiliation, I would hold that plaintiffs have failed to establish racial bloc voting in most, but not all, of the counties.

On the other hand, where the reluctance of white voters to support minority- preferred candidates cannot readily be attributed to partisan affiliation, I would hold that plaintiffs have established an inference, one to be tested by a consideration of the *Zimmer* factors, that race is at work. The majority argues that a rule providing that racial bloc voting exists only where divergent voting patterns are not caused by partisan affiliation imposes a requirement on plaintiffs that they prove that white voters' rejection of minority-preferred candidates is due to "racial animus." In one sense this is true, in that evidence of partisan voting is probative under § 2 as well as *Whitcomb* and *Gingles* precisely because it tends to show that voters are not animated by racial considerations in selecting candidates.

In another sense, however, the majority's interpretation is incorrect. There are many other possible non-racial causes of voter behavior beyond partisan affiliation. A rule conditioning relief under § 2 upon proof of the existence of racial animus in the electorate would require plaintiffs to establish the absence of not only partisan voting, but also any other potential innocent explanation for white voters' rejection of minority candidates. I think that a rule requiring proof that the failure of white voters to support a particular minority candidate was not attributable, for example, to her inexperience or her reputation as a "bad" judge, see the discussion of the court's treatment of Travis County, *infra*, would impose far too great a burden on plaintiffs. Such a requirement would make racial bloc voting both difficult and, considering the additional analysis that would be needed, expensive to establish. Moreover, it would facilitate the use of thinly-veiled proxies by permitting, for example, testimony that a Hispanic candidate was a "bad" judge to defeat a claim that white voters' refusal to support

him was based on race or ethnicity. Finally, an inquiry into causation beyond partisan affiliation seems inconsistent with the fundamental division between "partisan politics" and "racial vote dilution" under § 2. For these reasons, I would limit our inquiry into racial bloc voting to determining whether divergent voting patterns are caused by partisan differences, with the appropriate inference being drawn from this finding.

The importance of the distinction in § 2 jurisprudence between illegal vote dilution and political defeat, between protecting racial minorities and fostering the work of political coalitions, has led some to question whether different racial or ethnic minority groups, usually blacks and Hispanics, should be permitted to form a single minority group within the meaning of the Voting Rights Act. *League of United Latin American Citizens v. Midland Indep. School District*, 812 F.2d 1494, 1505-07 (5th Cir.1987) (Higginbotham, J., dissenting); Katherine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a 'Rainbow Coalition' Claim the Protection of the Voting Rights Act?*, 21 Pacific L.J. 619, 641-57 (1990). We have determined, however, that such suits are permissible where the evidence suggests that the two groups are politically cohesive, *see, e.g., Midland I.S.D.*, 812 F.2d at 1500-02, and I accept the authority of these decisions. At the same time, I do not believe that plaintiffs should be able to avoid its full effects. The defendants claim that the district court erred in refusing to consider elections involving Hispanic and white candidates in Harris and Tarrant Counties, counties in which plaintiffs proceed on behalf of black voters only, but where the indisputable evidence showed that blacks and Hispanics were politically cohesive. I agree.

Blacks and Hispanics have joined forces for purposes of this suit in Midland, Lubbock, and Ector Counties. In these counties, I would agree that white-Hispanic elections are relevant to show legally significant white bloc voting, because the Hispanic candidate provides the combined

Hispanic-black minority with a viable minority choice. But the plaintiffs contend that where they represent only black voters, white-Hispanic elections in which the Hispanic candidate received the support of black voters are irrelevant. A difference in litigation strategy cannot support this distinction. Cohesion is a fact, not a strategic card to be played at the caprice of a plaintiff. As we stated in *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir.1988), "if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown." *Id.* at 1245 (footnote omitted). If blacks and Hispanics vote cohesively, in effect making them a single minority group, then elections with a candidate from this single minority group are elections with a viable minority candidate. The plaintiffs cannot have it both ways.

Plaintiffs contend that there is evidence is the record suggesting that blacks and Hispanics were not politically cohesive in Harris and Tarrant Counties. They do not tell us to which evidence they refer, and understandably so. The record shows that blacks and Hispanics were more cohesive in Harris and Tarrant Counties than in Midland and Ector Counties, where the plaintiffs represent both blacks and Hispanics and the district court found cohesion.

In Harris County, Dr. Taebel studied 46 elections in which he determined the percentage of black and Hispanic votes cast for the minority/winning candidate. In 35 elections the black and Hispanic vote percentages varied by less than 10%. Similarly, the levels of black and Hispanic support for the same candidate were within ten percentage points in 13 of the 17 elections studied in Tarrant County. In Midland County, by contrast, the black and Hispanic voting percentages differed by less than 10% in only 4 of the 8 elections analyzed; in Ector County, this close correlation between the preferences of Hispanic and black voters was shown in just 2 of 10 elections. I do not dispute the district court's findings of cohesion in Midland, Ector, and Lubbock Counties, for in those counties a significant number of blacks and Hispanics *usually* voted for the same candidates.

Gingles, 478 U.S. at 56, 106 S.Ct. at 2769. But these findings compel the conclusion that there is also black-Hispanic cohesion in Harris and Tarrant Counties. The district court thus clearly erred in ignoring elections involving Hispanic and white candidates in these counties.

The majority attempts to salvage the plaintiffs' argument by recasting it in terms of appellate procedure. According to the court, the district court's refusal to consider the results of elections pitting Hispanic candidates against whites "was not properly raised before the district court and therefore is not properly before us on appeal." Majority op. at [316a]. The court correctly notes that the defendants did not ask the district court to find that blacks and Hispanics were cohesive in Tarrant and Harris Counties, but that is not the nature of the claim they press here. Defendants do not challenge the lower court's failure to find that Hispanics and blacks were cohesive; rather, they argue that the district court committed legal error by excluding Hispanic- white elections in determining whether white bloc voting existed in Harris and Tarrant Counties. It is true that this claim is, as the majority suggests, "fact-based," in that the validity of the district court's exclusion of these elections turns on whether blacks and Hispanics are cohesive, but the defendants contend that the evidence of cohesiveness is indisputable, a claim that is amply supported by the record and not contested by the majority. In sum, the court's rejection of defendants' claim is wholly unpersuasive and its refusal to consider white-Hispanic elections in Harris and Tarrant Counties is unjustified.

Finally, the majority's holding of no § 2 violation in Travis County, while upholding the district court's finding of dilution in all others, is worthy of special note. This illustrates the difficulties present in the case, for the majority must modify its test in order to avoid liability. The majority concludes that plaintiffs have failed to establish legally significant white bloc voting, *Gingles*'s third factor. I cannot say with such confidence that plaintiffs did not satisfy the threshold test. Instead, I would hold that the plaintiffs failed

to show dilution under the totality of the circumstances.

The majority departs from its previous analysis on three significant points. First, Travis County was one of only two counties where voter registration statistics could have been introduced, tending to *prove* that past discrimination hindered the ability of Hispanics to participate in the political process. The evidence showed that only 38.5% of eligible Hispanic voters were registered to vote, a much lower rate than in Bexar County, the only other instance in which evidence tending to *prove* this *Zimmer* factor was offered. The fact that the majority could find that Hispanics enjoy an equal opportunity to participate in the political process in spite of this evidence betrays the court's analysis of other counties, where the *Zimmer* factors pertaining to past discrimination often seem to have nearly dispositive weight in the absence of any evidence of depressed minority participation.

Second, the majority has upheld the district court's determination and plaintiffs' argument that black plaintiffs are entitled to limit their proof to those elections involving black candidates and may exclude those elections pitting a Hispanic candidate against a white candidate, even where these Hispanic candidates are preferred by an overwhelming majority of black voters. In Travis County, however, where plaintiffs represent only Hispanics, the significance of a loss by a Hispanic candidate is discounted because a black candidate, who was not the Hispanic-preferred candidate, received a bare majority of the white vote. This analysis goes well beyond the approach I have urged, which would include elections involving candidates from a different minority group only upon a showing that blacks and Hispanics vote cohesively. The election of a black candidate who is not the choice of Hispanics in the end seems relevant because it tends to demonstrate that the voting preferences of whites are not attributable to racial considerations, a showing that I believe quite probative but one that the majority, at least in the other eight counties at issue, finds

insignificant.[5]

The majority's reliance on causation, intimated above, becomes unmistakable in its treatment of another election loss by a Hispanic judge. The court asserts that this defeat is explained by "testimony indicating that the *reason* Gallardo lost is because he was a 'bad judge.' " Majority op. at 802 (emphasis in original). As in its reliance on the election of a black candidate to explain the defeat of a Hispanic candidate preferred by Hispanics, the court's analysis goes far beyond the position it has previously discarded. As I have indicated, our analysis of causation should be limited largely to an inquiry into whether divergent voting patterns among minorities and whites are attributable to partisan voting. A demonstration that minority and white candidates receive roughly equal levels of support from their party creates the inference that a minority group's inability to elect representatives of its choice is not attributable to race. On the other hand, a showing that white voters are less inclined to give their votes to the minority candidates on their party's ticket creates an inference, one to be tested by an analysis of the *Zimmer*

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[5]The majority contends that evidence that white voters supported a black candidate rather than a Hispanic candidate preferred by Hispanic voters instead suggests "'that another candidate, equally preferred by [Hispanics], might be able to attract greater white support in future elections.'" Majority op. at [226an6](quoting *Gingles*, 478 U.S. at 100, 106 S.Ct. at 2792 (O'Connor, J., concurring)). White voters' rejection of a Hispanic candidate in a Democratic primary cannot be explained by partisan affiliation. Since our analysis would change materially had white voters chosen to support the white candidate instead of the black candidate, I would submit that this election is indicative of future success for Hispanic candidates among white voters *only* because it shows that whites' preferences are not determined by racial or ethnic considerations. In the absence of other reasons why white support for a black candidate who was not the choice of Hispanic voters suggests that Hispanic candidates "might be able to attract greater white support in future elections," the majority's repudiation of my reading of its analysis is inexplicable.

factors, that race is at work. I would be quite reluctant to rely, as the majority does here, on anecdotal testimony concerning the characteristics of a particular candidate to establish that white voters were not motivated by racial or ethnic considerations. There are several reasons for this reluctance, some of which have been addressed above, but the most important one is that the Supreme Court has authorized a consideration of partisan voting in *Whitcomb* and *Gingles* and we should not be quick to stray from this mark.

As I stated, I agree with the majority that plaintiffs have not proven that they do not have an equal opportunity to participate in the political process and elect representatives of their choice in Travis County. That the court must employ an approach incorporating much of the analysis it has previously rejected to reach what it understands to be the right result would seem to provide ample reason by itself to question whether the approach used to find illegal vote dilution in the other eight counties at issue is the proper test.

III

In addition to severing racial discrimination and the Voting Rights Act, the majority errs by failing to weigh correctly the state's interest in defining the judicial office of district judge. As this panel previously recognized, *see LULAC I*, 902 F.2d 293, 307-09 (5th Cir.1990), *vacated*, 902 F.2d 322 (5th Cir.1990) (en banc), important reasons exist to link the electoral bases of district courts to their primary jurisdiction. The Supreme Court directed that on remand this interest would be weighed in determining whether a violation of the Act has occurred.

The majority flees this command with an over-the-shoulder characterization of the Supreme Court's opinion as containing "isolated passages" "suggesting" that the state's interest will be weighed. Majority op. at [256a]. This flight fails. The Court focused on this linkage, and its language belies the asserted ambiguity:

> [T]he State's interest in electing judges on a district-wide basis ... is a factor to be considered by the court in evaluating whether the evidence in a particular case supports a finding of a vote dilution *violation* in an election for a single-member office.
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> [W]e believe that the State's interest in maintaining an electoral system—in this case, Texas' interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters—is a legitimate factor to be considered by courts among the "totality of circumstances" in determining whether a § 2 violation has occurred. A State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry, and the Fifth Circuit has expressly approved the use of this particular factor in the balance of considerations. See *Zimmer* v. McKeithen, 485 F.2d 1297, 1305 (CA5 1973), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976). Because the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices is merely one factor to be considered in evaluating the "totality of circumstances," that interest does not automatically, and in every case, outweigh proof of racial vote dilution.

Houston Lawyers', ___ U.S. at ___, 111 S.Ct. at 2380-81 (emphasis in original).

No other court has had difficulty in reading this language. All correctly understood the Court's decision and weighed the state's interest in an electoral scheme in the totality of the circumstances. *See e.g., Nipper v. Chiles*, 795 F.Supp. 1525 (M.D.Fla.1992); Magnolia Bar Ass'n, *Inc. v. Lee*, 793 F.Supp. 1386 (S.D.Miss.1992); Southern Christian Leadership Conf. of *Ala. v. Evans*, 785 F.Supp. 1469 (M.D.Ala.1992). Commentators have also recognized that *Houston Lawyers'* directs courts to consider the strength of the state's interest at the liability stage. "[T]he Court

recognized that in balancing the many factors in the totality of the circumstances test, the state interest in districtwide judicial elections may, in some cases, outweigh proof of racial voter dilution." Mary T. Wickham, Note, *Mapping the Morass: Application of Section 2 of the Voting Rights Act to Judicial Elections*, 33 Wm. & Mary L.Rev. 1251, 1285 (1992).

The majority sees the weighing of the linkage interest in the liability determination as a radical reworking of the traditional balancing test—which could not have been intended. I read the Supreme Court to say what it means, and find nothing radical in that meaning. The amended Act, like court decisions before and after it, considers the totality of the circumstances. Significantly, the Court in *Houston Lawyers'* cited *Zimmer* at page 1305, where we noted the significance of a strong, as opposed to merely non-tenuous state policy:

> Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that *the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, Whitcomb v. Chavis, [cite], would require a holding of no dilution.*

485 F.2d at 1305 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971)) (emphasis added). The Senate Report on the 1982 amendment to § 2 endorsed both *Zimmer* and *Whitcomb* as parts of the pre-*Bolden* precedential standards which Congress intended to reinstate. S.Rep. 417 at 20-21, 23, 27-29; *reprinted in* 1982 U.S.Code Cong. & Admin.News at 197- 98, 200-01, 204-07.

The majority refuses to hold that we must weigh the state's interest, see majority op. at [263a], and then proceeds to weigh it, finding it insubstantial. That effort is flawed, misapprehending both the role and importance of linking jurisdiction to electoral base. While a state's interest will not automatically preclude a § 2 violation, Texas' substantial interest in preserving linkage can, at the least, outweigh

marginal evidence of dilution.

Linking primary jurisdiction to the electoral base advances Texas' vital interest in judicial fairness and independence.[6] Each district judge remains accountable to all voters within his or her jurisdiction, preserving "the fact and appearance of independence and fairness [which] are so central to the judicial task." *LULAC II*, 914 F.2d at 646 (Higginbotham, J., concurring); *see also* John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 Baylor L.Rev. 339, 364 (1988) ("the very *perception* of impropriety and unfairness undermines the moral authority of the courts"). Each judge acts alone, rather than in a collegial body, distinguishing this office from most elective positions. Thus, Texas' interest in district-wide elections goes beyond its interest in choosing officials a certain way. This election scheme is an integral component of the structure and effectiveness of the state judiciary. See *LULAC II*, 914 F.2d at 649-51 (Higginbotham, J., concurring). One member of the majority has twice previously agreed with this conclusion. *See id.* at 634; *LULAC I*, 902 F.2d at 294.

The substantiality of similar linkage interests in Florida and Alabama has recently been acknowledged. *See Nipper v. Chiles*, 795 F.Supp. 1525, 1548 (M.D.Fla.1992) (holding Florida's legitimate interest in linkage weighed against violation); *Southern Christian Leadership Conf. of Ala. v. Evans*, 785 F.Supp. 1469, 1478 (M.D.Ala.1992) (holding Alabama's strong interest in linkage weighed against violation). At least twenty-six other states currently elect

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[6]The assertion that this interest had its "genesis" in Chief Justice Phillips' testimony at trial is nonsense. Its actual genesis was the Texas Constitution of 1850, which first provided for district-wide election of district judges. *See LULAC II*, 914 F.2d at 646 (Higginbotham, J., concurring). Nor is this interest claimed only by Texas. Both Florida and Alabama have asserted the interest in voting rights cases, see text *infra* at p. [414a-415a].

judges of their principal trial courts.[7] Twenty-two of them, like Texas, Alabama, and Florida, employ district-wide, at-large elections. Of the remaining four, North Carolina allows every elector within a judge's jurisdiction to vote on that judge by holding statewide elections for district courts. Louisiana and Mississippi only recently abandoned at-large judicial elections in order to end prolonged litigation. Only in Cook County, Illinois, have judges with county-wide jurisdiction been historically elected from electoral districts smaller than the county—and those courts have hardly been exemplars of judicial propriety.[8] On the whole, the overwhelming preservation of linkage in states which elect their judges strongly supports Texas' contention that linkage is integral to the judicial role and is not simply Texas' preferred method of election.

The Supreme Court on the same day it decided *Houston Lawyers'* observed that, in our federal system, "the States' power to define the qualifications of their officeholders [referring to judges] has force even as against the

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[7]These states are: Arizona, California, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Washington, West Virginia, and Wisconsin. Some of these states appoint some trial judges, while others hold retention elections after initial selection by contested election.

[8]During the 1980's, federal indictments alleged that the Circuit Court of Cook County was a corrupt enterprise in RICO prosecutions of Chicago judges. *See U.S. v. Glecier*, 923 F.2d 496, 498 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 54, 116 L.Ed.2d 31 (1991). Cook County Circuit Judges were the target of the FBI's Operation Greylord, which resulted in the fraud, bribery, and RICO convictions of many circuit court judges. *See e.g. U.S. v. Holzer*, 840 F.2d 1343 (7th Cir.), *cert. denied*, 486 U.S. 1035, 108 S.Ct. 2022, 100 L.Ed.2d 608 (1988); *U.S. v. Reynolds*, 821 F.2d 427 (7th Cir.1987); *U.S. v. Murphy*, 768 F.2d 1518 (7th Cir.1985), *cert. denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986).

proscriptions of the Fourteenth Amendment." *Gregory v. Ashcroft*, ___ U.S. ___, ___, 111 S.Ct. 2395, 2405, 115 L.Ed.2d 410 (1991).[9] Gregory described the state's interest in maintaining a capable judiciary as "legitimate, indeed compelling." *Id.* ___ U.S. at ___, 111 S.Ct. at 2407. Likewise, Texas has at least a substantial interest in defining the structure and qualifications of its elective judiciary. It has done so by refusing throughout its entire history to allow the jurisdictional bases of its trial courts to fall short of its election boundaries. Texas as a distinct political entity is entitled to strive for all the judicial independence that an elected judiciary can deliver. If setting the age requirements for judges lies at "the heart of representative government," surely a state's explicit definition of the authoritative reach of its judicial offices is also a powerful interest. *Id.* ___ U.S. at ___, 111 S.Ct. at 2402.

The suggestion that Texas abandoned this interest by permitting county residents to decide to create districts smaller than counties is false. The opposite is true. Texas gave voters the power to reconsider the interest. Not a single county in Texas has voted to break the link between jurisdiction and electoral base—254 distinct reaffirmations of policy. Even if a county were to subdivide, the state preserves the interest for all other counties. *Cf. Mahan v. Howell*, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320, *modified*, 411 U.S. 922, 93 S.Ct. 1475, 36 L.Ed.2d 316 (1973). In *Mahan*, the Court recognized that although Virginia divided one county when reapportioning its state legislature, it retained its interest in preserving boundaries of all other political subdivisions. *Id.* 410 U.S. at 327, 93 S.Ct. at 986.

The majority mistakenly suggests that Texas' interest deserves little weight because it might be accommodated by

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[9]Contrary to the majority's assertion, the Court held that even if ADEA was based on Congress' powers under the Fourteenth Amendment rather than the Commerce Clause, this state interest must be respected. *Gregory*, ___ U.S. at ___, 111 S.Ct. at 2405.

some remedies. Dismissing linkage on the basis that it might be preserved by certain remedies simply fails to weigh that interest in determining whether a violation has occurred. The majority shunts consideration of the interest from the liability stage to the remedy stage, contrary to *Houston Lawyers'*. Plaintiffs have asserted that at-large election of district judges violates § 2. We must decide whether the state's substantial interest in *that* electoral scheme outweighs plaintiffs' proof of dilution.

In several contexts courts balance states' interests against undesirable results. In doing so, we test the validity of the asserted interest or goal by considering how it may be achieved. Here, Texas' interest is in linking judges' electoral bases to their jurisdiction. That goal may only be achieved by a district-wide election system. The majority's suggestions to the contrary are red herrings. Cumulative or limited voting are election mechanisms which preserve district-wide elections. Thus, they are not even remedies for the particular structural problem which the plaintiffs have chosen to attack.

Plaintiffs went to trial attempting to prove the *Gingles* elements. Those elements test whether, but for district-wide, at-large voting, minority preferred candidates would likely prevail. That is all the *Gingles* elements prove. They do not establish whether other features of an electoral scheme, such as anti-single shot rules or majority runoffs, cause dilution. Since plaintiffs tried this case on the basis of *Gingles*, they did not show that the absence of cumulative or limited voting within the at-large scheme diluted minority votes. The question is whether Texas' district-wide election of trial judges is illegal. To answer that question, we must determine the weight of its linkage interest without regard to purported remedies which preserve the challenged at-large scheme. Plaintiffs cannot attack at-large voting as a violation of § 2 and ignore the state's interest in preserving linkage—unique to trial judges—by insisting that they will embrace a remedy which preserves that scheme. This cannot be done if *Houston Lawyers'* holds that the state's

interest must be considered in the liability phase—which is precisely what it held.

The majority revives the argument that Texas has little interest in linking jurisdiction and electoral base because non-resident litigants may appear before judges they did not elect. Nothing has changed about this claim since it was previously rejected. *See LULAC II*, 914 F.2d at 651 (Higginbotham, J., concurring). The majority's efforts to distinguish jurisdiction from venue prove little, if anything. Texas venue law, as amended in 1983, has been influenced by both Spanish and English principles. Besides protecting defendants from inconvenient forums, the rules strive to ensure that local matters are tried in local courts.[10] In addition to conducting trials, district judges have responsibilities such as selecting a county's grand jurors. Tex.Code Crim.Proc.Ann. art. 19.01 (Vernon Supp.1993). Thus, despite the state-wide jurisdiction which the majority emphasizes, the district court remains essentially a territorial court focused upon the county or counties comprising its district.

Perhaps the majority understates the local nature of the district court by overlooking the area of Texas practice where it is most evident: criminal law. There domicile and hence convenience to the defendant have never been a consideration. Although the state constitution permits a district court to try any Texas felony, *Ex Parte Watson*, 601 S.W.2d 350, 352 (Tex.Crim.App.1980) (en banc), the Code of Criminal Procedure limits the reach of that jurisdiction. In criminal practice a charging instrument must establish that the district court's county is a proper venue. Tex.Code Crim.Proc.Ann. arts. 21.02(5), 21.21(5) (Vernon 1989).

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[10]See generally Joseph W. McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 Texas L.Rev. 24, 36-40 (1959); Charles T. Frazier, Jr., Note, *Venue Procedure in Texas: An Analysis of the 1983 Amendments to the Rules of Civil Procedure Governing Venue Practice Under the New Venue Statute*, 36 Baylor L.Rev. 241, 241-44 (1984).

Since the propriety of venue goes to the authority of the court, it is "quasi-jurisdictional in nature." George E. Dix, *Texas Charging Instrument Law: The 1985 Revisions and the Continuing Need for Reform*, 38 Baylor L.Rev. 1, 71 (1986).[11] But whether the area of practice is criminal, civil, or family law, the conclusion reached in the concurring opinion in *LULAC II* remains valid. "[T]he state recognized that elimination of [the] risk and appearance of bias was essential to the office it was creating by an elaborate set of rules controlling venue." 914 F.2d at 651 (Higginbotham, J., concurring). If a Code of Judicial Conduct were alone sufficient to dispel the public's concern with "home cooking" and bias, there would be less need for venue rules. Instead, the district-wide election of judges joins with those rules to assure fairness and independence in the district courts.

Conclusion

The aggressive play in this case with Texas's judicial offices was as predictable as it is unwise. Federal courts were asked to do a political and legislative task and this panel responded with self assurance enjoyed only by officials steeped in the mythology that Courts are the sole arbiters of constitutional right and custom and consensus about those rights carry no sway. The image of the noble federal judge carrying out his task of protecting people from themselves is heady stuff indeed. That a state has throughout its history thought it essential to preserve linkage is of no moment ... of no weight and it is cast aside in a flood of legalisms. In

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[11]Indeed, despite technical differences between jurisdiction and venue, Texas law commonly refers to the county in which a district court is located as its "jurisdiction." *See, e.g. Hodge v. State*, 527 S.W.2d 289, 292 (Tex.Crim.App.1975) (holding that charging instrument need only allege the county as the place of the offense when "the court in which the offense is tried has county-wide jurisdiction"); Tex.Code Crim.Proc.Ann. arts. 21.02(5) and 21.21(5) (stating that indictments and informations must show that the offense occurred within the court's "jurisdiction").

doing so the majority proceeds, as we often do, with the certitude that judges and lawyers are the anointed defenders of constitutional values and liberties. True, as far as it goes but we know and admit in quieter moments that constitutional values rest on the broader foundations of consensus, and the genetic-like grip of generation after generation of understanding. The point is made by a look at the constitutional histories of the former Soviet Union and many South American countries with their beautiful documents unsupported by a culture of commitment to liberty. As T.S. Eliot put it:

> The general ethos of the people they have to govern ... determines the behavior of politicians.

Congress may read a new consensus and strike a new balance, as the representative branch locates a new sense. But when it fails to do so it cannot simply hand its task uncharged to the courts with little more than "here, you figure it out." Courts must accept such assignments with caution, asking for clearer statements as faithful agents probing for their charge. Much can be said, but I need not pause here because we need not reach so far. I ask only that we be a bit more modest and not so bent on announcing new truths while draped with the hypocrisy that it is duty's call that we answer. We ought not cast aside the interests of Texas as little more than an ephemeral election rule in collision with voting rights. Its weight is substantial and the found "violations" are here more remote from the Voting Rights Act or other normative voting rule than any we have encountered.

Congress was on sound ground in explicating the Civil Rights Amendments, but it failed to grip the difficult choices in resolving the political choices confronting it in 1982. Instead of taking hold Congress lifted itself from the maelstrom in which it found itself by lifting the debate to a level of generality about election rights that sapped statutory clarity. The 1982 amendments to the Voting Rights Act gave the courts little help in defining the dilution it forbids. One thing is sure, Congress did not, because it could not, sever

race from the voting rights inquiry. The majority in every practical way today does precisely that.

We are enjoined to make pragmatic assessments of the political realities in these voting cases. The majority confounds common sense with its pretense that partisan voting sheds no light while accepting its totals as proof of bloc voting. This despite the inescapable fact that partisan voting is the single most powerful explanatory variable in the data. Its glib dismissal makes this a fairyland. As uncertain as our congressional instructions are, they surely did not contemplate the collapse of the Voting Rights Act into a partisan fray gleefully attended by federal judges, none of whom are of course political in any partisan way. When the Republican National Committee and the NAACP join hands in attacking at-large districts surely we can be honest enough to observe that dilution of the voting rights of minorities has now become cover for political factions, coalitions, and parties to gain advantage. This is politics as usual except it has now walked through the courthouse door and so far we haven't said they are in the wrong hall. It is time we do that.

The next step must be to vacate the panel opinion and take this case en banc. Having lost the compass of race the majority is unable to develop a meaning for even dilution. The result is that the majority has looked inward and what we see is their own display and sense of the result they prefer in this case. In their march to result, the powerful confluence of tradition and state sovereignty has no voice. I would have resolved this case with the proposed opinion which is attached hereto as Appendix A.

APPENDIX A

I.

This panel again turns to the Voting Rights Act and the election of state judges. In our first effort we held that the Act covers judicial elections but concluded that the election of state district judges in county-wide elections in Texas did not violate § 2. *League of United Latin American Citizens v.*

Clements, 902 F.2d 293 (5th Cir.1990) ("*LULAC I* "). We considered the history of judicial elections in Texas and the office of district judge—the court of general jurisdiction. Our study persuaded a majority of the panel that Texas had a special interest in linking the jurisdictional and elective base of the trial courts, an interest accented by unwavering support throughout Texas history. Finding no truly informing analogues for resolving such an attack on at-large voting supported by a unique state interest, we looked to the weighing constructs familiar to the act. We concluded that, as a matter of law, the state interest linking jurisdiction and elective base outweighed its potentially dilutive effect. LULAC I, 902 F.2d at 308. The parties questioned only the at-large election of judges and have not questioned other elements of process for electing Texas district court judges.

A majority of this court sua sponte ordered reconsideration of the panel decision en banc. *League of United Latin American Citizens v. Clements*, 914 F.2d 620 (5th Cir.1990) ("*LULAC II*"). The en banc court held that § 2 of the Act did not apply to judicial elections, rejecting the contrary view of the panel.

The Supreme Court granted certiorari and reversed, holding that § 2 does apply to state judicial elections. *Houston Lawyers' Ass'n v. Attorney General*, [___ U.S. ___] 111 S.Ct. 2376 [115 L.Ed.2d 379] (1991). The Supreme Court also held Texas has an especial interest in linking the elective and jurisdictional bases of district judges. *Houston Lawyers'*, [___ U.S. at ___], 111 S.Ct. at 2381. The Court did not agree, however, that this state interest outweighed its dilutive effect in all cases, as a matter of law. Rather, the Court held that outcomes of the balancing will be case-specific. It also held that the balance will be struck in an inquiry into the totality of the circumstances. Justice Stevens explained that the state interest in linkage was to be weighed in deciding "whether a § 2 violation occurred." *Id.* Justice Stevens made plain that assessing the linkage interest is part of the determination of liability and not remedy alone. It was at this juncture that the Supreme Court

disagreed with the Department of Justice position, choosing to rest between the "matter of law" view of the concurring opinion and the "goes only to remedy" view of the Department of Justice.

On remand the en banc court in turn remanded to the panel. We have had the benefit of oral argument and additional briefing and now must decide whether the district court erred in holding that Texas' system of electing judges at- large in nine Texas counties violates § 2 of the Voting Rights Act.

This is nominally a single case with common legal issues. However, after setting the common legal standard, we face nine distinct factual patterns. We will examine the findings of the district court in each county because each has unique political histories and cultures. In doing so, we heed the Supreme Court's admonishments to look to the political realities.

On July 11, 1988, individual voters and organizations, including the League of United Latin American Citizens sued in federal district court alleging that Texas' system of electing state trial judges violated plaintiffs' federal rights in several Texas counties[1] under § 2 of the Voting Rights Act and the U.S. Constitution. Texas voters elect their trial judges in county wide elections. A voter in Dallas County, for example, may vote for all of the trial courts of general jurisdiction in the county, although each candidate runs for a particular court within the county's judicial system.

Plaintiffs contend that this method of electing trial judges violates § 2 of the Voting Rights by impermissibly diluting the voting power of Hispanics and blacks. Plaintiffs proceed on behalf of different ethnic groups or combinations of ethnic groups in different counties. Depending on the

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[1]Plaintiffs originally challenged the election of district judges in 44 counties, but by trial winnowed their targets to the following nine urban counties: Harris County, Dallas County, Travis County, Tarrant County, Jefferson County, Ector County, Bexar County, Midland County, and Lubbock County.

county, they argue that Hispanic voters, black voters, or the combination of both Hispanic and black voters "have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice."

The case was tried in September 1989 in the U.S. District Court for the Western District of Texas. On November 8, 1989, the district court issued its opinion, sustaining plaintiffs' claim in every county. The district court found that, in all nine counties, minority voters were geographically compact and voted cohesively for the same candidates and that these candidates were consistently defeated by a majority of white voters who voted as a bloc. These findings, according to the court, constituted a prima facie case of illegal vote dilution under *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 [92 L.Ed.2d 25] (1986).

The district court also found that, under the totality of the circumstances, this dilution violated § 2 of the Voting Rights Act. In all counties, the district court based its finding of dilution on five facts. These were (1) a general history of discrimination; (2) underrepresentation of minorities on the district court bench; (3) the majority run-off requirement in primary races; and (4) the prohibition against single-shot voting. In the five larger counties, the district court also found that the counties' large size could hinder minority electoral success. Finally, in Dallas County only, the district court found evidence of racial appeals in elections.

Opting to follow Part III(c) of Justice Brennan's opinion in *Gingles*, a part of the opinion that a majority of justices did not join, the district court ruled after trial that the cause of county voting patterns was legally irrelevant. The district court decided to ignore fully developed evidence regarding voters' partisan affiliation—evidence pointing unerringly to the conclusion that partisan affiliation of candidates was the single most powerful explanation of election outcomes.

In evaluating the totality of the circumstances, the district court gave little weight to the state's historical insistence on

linkage. The district court held that any state interest in linkage could be protected under a system of electing judges from single-member districts. As we will explain, this both under-valued and misapprehended the state interest.

The district court judgment declared that Texas' at-large system of electing judges in nine counties violated § 2 of the Voting Rights Act and enjoined future elections under an at-large system. The district court at the same time rejected the constitutional attack finding no intent to dilute minority votes by county-wide election of district judges.

The parties presented statistical studies of county voting patterns in both judicial and non-judicial elections as well as opinions and anecdotal evidence of local politics. Supporting data differed, although studies included many of the same elections. Defendants' expert witness, Dr. Taebel, sometimes analyzed elections with no minority candidate. Plaintiffs' experts, Drs. Brischetto and Engstrom, limited their studies to those elections with a minority candidate.

Plaintiffs, however, did not examine every election in which there were minority candidates. In counties where plaintiffs were proceeding on behalf of black voters only, plaintiffs studied only those elections in which black candidates had run and ignored those elections with Hispanic candidates. Likewise, in counties where plaintiffs were proceeding exclusively on behalf of Hispanic voters, plaintiffs examined only those elections in which Hispanic candidates had participated, ignoring those races with black candidates. Simultaneously, plaintiffs urged that blacks and Hispanics were members of a single cohesive voting group in Ector, Midland, and Lubbock Counties. Plaintiffs considered all elections in which a minority had been a candidate only in these three counties.

Both parties offered evidence that minority voters in each county voted cohesively and that the minority-preferred candidate was the Democratic candidate. There was also evidence that minority residence was sufficiently compact that a minority district could be drawn in every county.

II. *General Legal Principles*

A successful claim that an at-large election dilutes the votes of protected minorities under § 2 of the Voting Rights Act must first meet the three threshold criteria explained in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 [92 L.Ed.2d 25] (1986): (1) the minority group in question is sufficiently large and geographically compact that it could constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the white majority votes sufficiently as a bloc to cause it usually to defeat the minority's preferred candidate. *Id.* at 51, 106 S.Ct. at 2766-67; *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1205-06 (5th Cir.1989).

Proving the three *Gingles* factors, however, does not prove liability under § 2. Plaintiffs must further show that, under the "totality of circumstances," the members of the protected class "have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice." 42 U.S.C. § 1973(b); *see also Monroe v. City of Woodville*, 881 F.2d 1327, 1330 (5th Cir.1989).

This inquiry into the "totality of circumstances" is guided, in part, by the nine criteria discussed in the Senate Judiciary Committee Report accompanying the 1982 amendment to the Voting Rights Act. These are "*Zimmer* factors." Drawn in large part from this court's opinion in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir.1973) (en banc) *aff'd on other grounds sub nom., East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 [96 S.Ct. 1083, 47 L.Ed.2d 296] (1976), they consist of nine signals of diminished opportunity for political participation of the minority group and election of the representatives of their choice. As the Senate Judiciary Report makes clear, these *Zimmer* factors are not the exclusive measures of dilution under the totality of the circumstances. S.Rep. 417, at 29, *reprinted in* 1982 U.S.Code, Cong. & Admin.News at 207.

The *Zimmer* factors guide the inquiry into whether the complaining minority group lacks "an equal opportunity to participate in the political process and to elect candidates of

their choice." *Gingles*, 478 U.S. at 44, 106 S.Ct. at 2763. Inquiry into the totality of the circumstances is more than mechanical "factor-counting" with its illusion of neutral decisionmaking. It is "a searching practical evaluation of the past and present reality" and "a functional view of the political process." *Id.* at 45 [106 S.Ct. at 2764]. Its focus is always whether the minority group has an opportunity for political participation equal to that of other voters.

But describing the trip is far easier than making it. It becomes especially complicated when we consider elections for trial court judges. We have earlier explained and will not here again rehearse that the judicial office differs from other elective offices in that the "appearance of independence and fairness [is] so central to the judicial task." LULAC II, 914 F.2d at 646 (Higginbotham, J., concurring); *see also Gregory v. Ashcroft*, [___ U.S. ___, ___] 111 S.Ct. 2395, 2407 [115 L.Ed.2d 410] (1991) (discussing how the deliberately fostered independence of judicial offices makes them different from other elective positions). The Supreme Court recognized that Texas' special interest in linking elective and jurisdictional base of its trial court judges was a "legitimate factor" to be weighed among the totality of circumstances *to determine liability*. *Houston Lawyers'*, [___ U.S. at ___], 111 S.Ct. at 2381.

Our task is to determine coherent means for weighing Texas' linkage interest considered as part of the totality of the circumstances. This task is made more difficult because the traditional totality of circumstances analysis asks only whether there was dilution. Including the linkage interest in the § 2 assessment changes the usual weighing process, since the state's interest is not a signal of dilution like the *Zimmer* factors. Instead, it is a factor to be balanced against such signals. We ask not only whether, under the totality of the circumstances, there was dilution but also whether such found dilution is sufficiently substantial to support a finding of liability, given the state's interest in linkage. In other words, the state's interest is weighed *against* proven dilution. *Houston Lawyers'*, [___ U.S. at ___] 111 S.Ct. at 2381 (noting

that linkage interest does not always "outweigh proof of racial vote dilution").

We must also review the district court's legal conclusion that evidence of the defeat of minority-preferred candidates because of partisan affiliation rather than race was not relevant. Finally, we must determine the universe of elections by which we test success of the minority-preferred candidate. These preliminary legal questions are the foundation upon which any analysis of the district court's factual finding of dilution must be based. We will then apply these principles to the district court's factual findings on a county-by-county basis.

A. *Relevance of Partisan Affiliation*

At trial, defendants maintained that partisan affiliation rather than race of either the voters or the candidates caused the consistent defeat of the minority-preferred candidate. Citing to Justice Brennan's plurality opinion in *Gingles*, the district court ruled after the trial that the cause of the voting patterns that led to the consistent defeat of the minority-preferred candidate was not relevant under *Gingles*.

Defendants maintain that this holding was erroneous. We agree. Both logic and the weight of authority make plain that the cause of racially polarized voting patterns can be relevant to the vote dilution inquiry. In particular, we hold that there is no illegal dilution of minority voting when polarized voting patterns are the product of partisan affiliation untainted by racial politics. We find in the 1982 amendments to the Voting Rights Act, their relation to earlier dilution jurisprudence, and the Supreme Court's decision in *Gingles* powerful support for the conclusion that § 2 does not prohibit electoral systems that allow the minority-preferred candidate to be defeated by partisan voting patterns unaffected by race. Proof of majority voting based on party affiliation prevents the showing of bloc voting required by *Gingles*.

Section 2 of the Voting Rights Act prohibits "denial[s] or abridgment [s] of the right of any citizen of the United States to vote *on account of race or color....*" 42 U.S.C. §

1973(a) (emphasis added). The provision by its terms requires a causal link between race and the electoral scheme's impediment to voters' equal participation in the political process. The Act does not reach inequality of participation not caused by ("on account of") race or color.

Our insistence that a nexus to race be maintained in applying § 2 does not rest alone on a parsing of statutory language, although the Act's plain language alone is sufficient. Rather, we insist that application of § 2 cannot escape its racial tether because that tether restrains the court from constitutional difficulty. The remedial power of Congress under the Civil War Amendments is for wrongs they prohibit. So the line between interest group politics and dilution of votes on account of race is both statutory and constitutional. Then-Justice Rehnquist summarized these limits. *City of Rome v. United States*, [446 U.S. 156, 206] 100 S.Ct. 1548, 1577 [64 L.Ed.2d 119] (1980) (Rehnquist, J., dissenting); *see also Oregon v. Mitchell*, 400 U.S. 112, 152 [91 S.Ct. 260, 279, 27 L.Ed.2d 272] (1970) (Harlan, J., concurring in part and dissenting in part).

Our task, then, is to locate the meaning of this link between race and inequality in political participation. We must decide whether this link is satisfied when the minority-preferred candidate consistently fails to win a majority of the white vote and consistently loses, if the losses were the result of partisan affiliation rather than racial politics. We conclude that such consistent defeat of the minority-preferred candidate cannot be "on account of" race, unless it is tied to racial bias in the electorate. This is the heart of § 2.

1. *Whitcomb v. Chavis*

In *Whitcomb* v. Chavis, 403 U.S. 124 [91 S.Ct. 1858, 29 L.Ed.2d 363] (1971), the Supreme Court held that the at-large election of state representatives and state senators from a multi-member district, Marion County, did not violate the Equal Protection Clause of the Fourteenth Amendment. Black residents in one part of Marion County, referred to as the "ghetto" by the *Whitcomb* Court, voted

heavily for the Democratic Party's candidates; however, as the rest of the County voted for the Republican candidate, the "ghetto's" preferred candidate was defeated in four out of five elections between 1960 and 1968. The *Whitcomb* plaintiffs maintained that, if the county were redistricted, the preferred candidate of the minority voters would win more frequently.

Justice White, writing for five members of the Court, rejected this challenge to the multi-district system. The *Whitcomb* Court noted that the Democratic Party regularly slated candidates "satisfactory to the ghetto" but that the Democratic Party lacked the votes necessary to prevail frequently in the county's general elections. *Whitcomb*, 403 U.S. at 151-52 [91 S.Ct. at 1873]. The Court further noted that both political parties were open to minority voters and candidates and that there were no impediments to minority participation in primaries, voting registration, or other aspects of elections. The Court, therefore, concluded that

> the failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls.

Id. at 153 [91 S.Ct. at 1874]. According to the *Whitcomb* Court, "[t]he mere fact that one interest group or another ... has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system." *Id.* at 154-55 [91 S.Ct. at 1875]. The Court, therefore, rejected the proposition that "invidious discrimination ... results when the ghetto, *along with all other Democrats*, suffers the disaster of losing too many elections." *Id.* at 153 [91 S.Ct. at 1874] (emphasis added).

It bears emphasis that in Marion County there was inevitably a high correlation between black votes and party votes. There was no suggestion in *Whitcomb* that such raw

correlations supported the idea that votes for Democratic candidates were proxies for racial interests. Nor did the *Whitcomb* Court dispute the findings of the three-judge panel—that black residents within the "ghetto" suffered from high unemployment, high levels of welfare assistance, poor housing, and other indicia of poverty. *Whitcomb*, 403 U.S. at 132 [91 S.Ct. at 1863]; *Chavis v. Whitcomb*, 305 F.Supp. 1364, 1376-81 (S.D.Ind.1969). The Court nevertheless found no dilution. The clear implication of *Whitcomb*, therefore, is that consistent defeat of minority- preferred candidates as a result of polarized voting, even when combined with poverty and other lingering effects of past discrimination, does not suffice to show illegal dilution, when such defeat is the result of partisan competition between parties that are fully open to members of all races.

2. *1982 Amendments to § 2 of the Voting Rights Act*

According to the Senate Judiciary Committee Report, the 1982 amendments to the Voting Rights Act enacted the "results test" contained in *White v. Regester*, 412 U.S. 755 [93 S.Ct. 2332, 37 L.Ed.2d 314] (1973) and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir.1973) (en banc), aff'd on other grounds sub nom., *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 [96 S.Ct. 1083, 47 L.Ed.2d 296] (1976). Congress understood *Whitcomb* to apply the "*White/Zimmer* " results test. S.Rep. 417 at 19-21, 30 (referring to the results test in "*Whitcomb*, *White*, *Zimmer*, and their progeny"), reprinted in 1982 U.S.Code Cong. & Admin.News at 196-99, 207. The Judiciary Committee pointed to the at-large systems upheld in *Whitcomb* to refute contentions by opponents of the 1982 amendments that its results test would require the automatic invalidation of at-large election systems. S.Rep. 417 at 33, *reprinted in* 1982 U.S.Code Cong. & Admin.News at 211.

We are not persuaded that § 2, as amended by the 1982 amendment and read in the light of *Whitcomb*, prohibits at-large districts in which the minority-preferred candidate is defeated by the voters' partisan affiliation. Section 2 was intended to prohibit electoral systems that lead to

"discriminatory results." The term is best understood in light of § 2's prohibition on electoral schemes that impede minority voters' political participation "on account of race or color." *See Solomon v. Liberty County*, 899 F.2d 1012, 1021-1037 (11th Cir.1990) (Tjoflat, J., concurring).

Under the results test, consistent defeat of minority-preferred candidates alone will not establish that minority voters are deprived of an equal opportunity to choose representatives on account of race. Such consistent defeat, by itself, is not the "discriminatory result" prohibited by § 2. If it were, the 1982 amendments to § 2 would have abandoned the law of *Whitcomb*.

The legislative history of the 1982 amendments indicates that voters' race- conscious voting is relevant to the determination of the statute's required nexus to "race or color." The Judiciary Committee's report repeatedly refers to the need to prevent "racial politics" and "racial political considerations" from interfering with minority voters' equal opportunity for political participation. *See* S.Rep. 417 at 33, reprinted in 1982 U.S.Code Cong. & Admin.News at 211; *Solomon*, 899 F.2d at 1027-32 (minority voters are denied "equal opportunity to participate meaningfully in elections" in "communities where racial politics ... dominate the electoral process"); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 (11th Cir.1984) ("section 2 is intended not to create race-conscious politics, but to remedy it where it already exists") (emphasis added). "Racial politics" implies racially conscious politics. It does not include politics in which minority voters only fail to achieve maximum feasible success because they were outvoted by other interest groups.

The 1982 amendment responded to *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490 [64 L.Ed.2d 47] (1980). Its overarching purpose was to eliminate Bolden 's requirement that plaintiffs prove that *legislators* intended to discriminate when they enacted or maintained a challenged electoral system. With the 1982 amendment, an electoral system cannot escape § 2 by innocent birth if its result is to dilute voting power "on account of race or color," but the

"on account of race or color" language remained a part of the Act.

It is suggested that this smuggles the banned intent into our analysis. We disagree. Rather, we are persuaded that this is the meaning of the plain language of the Act as amended. Under the 1982 amendments the state's intent in creating or maintaining an electoral system is not controlling. *Jones v. City of Lubbock*, 727 F.2d 364, 378 (5th Cir.1984) (purpose of 1982 amendments was to "prohibit electoral practices and procedures that created discriminatory results even though *the responsible government body* had not installed or maintained the electoral practice or procedure in order to discriminate") (emphasis added); *see also* S.Rep. 417 at 27 (1982 amendment designed to "make clear that plaintiffs need not prove a discriminatory purpose *in the adoption or maintenance* of the challenged system or practice in order to establish a violation" (emphasis added)), *reprinted in* 1982 U.S.Code Cong. & Admin.News at 205. Nowhere in the statute or its legislative history is there any indication that *voters'* racial prejudice is not relevant to voting patterns. Indeed, the testimony by supporters of the "results" test suggest that "private discrimination" is central to the issue of whether there is illegal dilution under § 2. *See, e.g., Hearings on the Voting Rights Act Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2nd Sess. 1367-68 (1982) (statement of Drew Days, Associate Professor of Law, Yale University) (§ 2's result test would operate "where a combination of public activity and *private discrimination* have joined to make it virtually impossible for minorities to play a meaningful role in the electoral process") (emphasis added).

The *Zimmer* factors, incorporated into the dilution analysis by the Senate Judiciary Committee's report, are directly concerned with the cause of voting patterns. One of the *Zimmer* factors concerns "whether political campaigns have been characterized by overt or subtle racial appeals"; another is the "extent to which members of the minority

group have been elected to public office." Both are relevant because they shed light on the political climate of the community—that is, the likely causes of voters' behavior.

Success of minority candidates goes directly to whether voters are influenced by race. As the facts of this case disclose, the minority candidate is not always the preferred candidate of the minority group. Therefore, the success of minority candidates must be relevant beyond showing that minority voters elect candidates of their choice. The success of minority candidates is significant in part because it indicates that white voters' racial bias is not excluding a candidate even when the minority-preferred candidate loses. Significantly, this *Zimmer* factor, directly relevant to the "on account of race" limits of the statute, is the only factor actually mentioned as probative in the text of the statute itself.

3. *Thornburg v. Gingles*

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752 [92 L.Ed.2d 25] (1986), is the Supreme Court's most detailed interpretation of § 2 as amended in 1982. Plaintiffs maintain that voters' motivations are not relevant to the vote dilution inquiry under *Gingles*. This asks too much of *Gingles*. Of the four opinions in *Gingles*, only Justice Brennan's plurality opinion concluded that causation was not relevant to the ultimate question of illegal racial vote dilution. *Gingles*, [478 U.S. at 62-74] 106 S.Ct. at 2772-78. Five Justices, writing separately, refused to join this part of Justice Brennan's opinion.

Justice White's brief opinion illuminates the relevance of partisan affiliation. Justice White notes that, in a district that is 60% white and 40% black, if six white and two black Republicans run against six white and two black Democrats, and all of the Republicans win, then, under Justice Brennan's analysis, there would be a likely § 2 violation, if black voters voted Democratic and were geographically compact. However, Justice White states that:

> [t]his is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what

> Congress had in mind in amending § 2 as it did, and it seems at odds with the discussion in *Whitcomb v. Chavis*, 403 U.S. 124, 149-160, 91 S.Ct. 1858, 1872-1878, 29 L.Ed.2d 363 (1971).

Id. [478 U.S. at 83, 106 S.Ct.] at 2783. Justice O'Connor, writing for herself and three other Justices, agreed with Justice White that the race of the candidate is relevant to the finding of racial vote dilution. *Id.* [478 U.S. at 100-01, 106 S.Ct.] at 2792. Justice O'Connor stated that the presence or absence of racial hostility among voters is relevant to the vote dilution inquiry, because such bias was relevant to determining whether minority voters could influence officials for whom they did not vote. Crucial to Justice O'Connor's analysis is the premise that minority voters can have influence even if their preferred candidates lose, if "other indirect avenues of political influence" are not barred by racial animosity in the community. *Id.*

The majority of Justices in *Gingles*, in short, took the position that both the race of the candidate and the voters' motivations were relevant to the inquiry into racial vote dilution. As Justice O'Connor points out, evidence that white voters reject minority-preferred candidates for reasons other than race precludes a showing of racial bloc voting by whites. *Id.* Moreover, Justice White's opinion implies that, where the minority-preferred candidate loses the white vote because of partisan affiliation, and the white voters give their support to black candidates of the white voters' preferred party, then the defeat of the minority-preferred candidate is not the result of illegal vote dilution but rather is the result of interest-group politics. This division of the Court cuts deep, reflecting quite different visions of voting rights and their statutory treatment. The division also reflects fundamentally different political views of factions and our constitutional arrangement for accommodating their simultaneous demands for fluidity and fixity.

We find that the law before the 1982 amendments of § 2, the amendments themselves, and *Gingles* support the conclusion that racial vote dilution does not occur when the

minority-preferred candidate is defeated by partisan affiliation and not "on account of race or color." In the structure erected by *Gingles*, we find that proof of majority voting based on partisan voting patterns unaffected by race precludes a finding of the third prerequisite: white bloc voting to defeat minority-preferred candidates. The black voter who supports a losing Democratic candidate in a county where the majority of voters are Republicans is in precisely the same position as the white Democratic voter in such a county. If the white Democratic voter is not the victim of a racially discriminatory result, then it is impossible to see why the black voter is. Both suffer an identical "political defeat at the polls," not "built-in bias" against a racial group. *Whitcomb*, 403 U.S. at 153 [91 S.Ct. at 1874-75]. Both are defeated because they belong to the weaker political party. Creating safe districts to protect the black Democrat but not the white Democrat subverts the very idea of political equality that § 2 is supposed to protect. See Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum.L.Rev. 1615, 1618-19 (1983) ("Giving some groups safe districts and proportional representation and not others thus necessarily treats the groups, and individual voters, unequally."); *see also Whitcomb*, 403 U.S. at 154, 91 S.Ct. at 1875 (questioning whether "poor Negroes of the ghetto [are] any more underrepresented than poor ghetto whites who also voted Democratic and lost"). "The mere fact that one interest group or another ... has found itself outvoted and without legislative seats of its own" provides no basis for finding illegal racial dilution where "there is no indication that this segment of the population is being denied access to the political system." *Whitcomb*, 403 U.S. at 154-55 [91 S.Ct. at 1874-75].

Section 2 was not enacted to create safe districts for political parties. It was intended to prevent minority voters from being shut out of interest group politics by race or color. Racially influenced voting presents a unique obstacle to coalition-building, different in kind from disagreement

over ideology or interest. As one commentator has observed, "prejudice is a lens that distorts reality. We are a nation of minorities and our system thus depends on the ability and willingness of various groups to apprehend those overlapping interests that can bind them into a majority on a given issue; prejudice blinds us to overlapping interests that in fact exist." John Hart Ely, *Democracy and Distrust* 153 (1980). Where the normal interplay of contending factions is untainted by "racial politics," and there are no barriers preventing black voters from joining and fully participating in all major political parties, forming coalitions, and taking their chances at the polls, there is no "discriminatory result" within the meaning of § 2.

We do not ignore the concerns of Justice Brennan's plurality opinion in *Gingles* that apparently race-neutral reasons for the minority-preferred candidates' defeat may be a proxy for race. Political party can become a proxy for race when voters support or oppose a political party because of their bias against racial or ethnic groups. See Thomas B. Edsall & Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics*, 137-53 (1991). The Act is violated when a minority-preferred candidate is defeated by the bias of white voters directed toward the candidate or his constituency. Describing the election in ostensibly race-neutral terms of partisan affiliation will not change the result.

Such a proxy, however, is not signaled by raw statistical correlation of partisan affiliation to race. Of course, socio-economic characteristics may have some correlation to race. *Gingles*, [478 U.S. at 69-70] 106 S.Ct. at 2776. This correlation may lead members of minority groups to give stronger support to certain political platforms than non-members give. As a result, a majority of minority voters may support a political platform opposed by a majority of non-minority voters, and the minority-preferred candidate may be consistently defeated.

The partial correlation of differences in political interest or opinion with race, however, does not demonstrate that

parties are proxies for racial groups. Partisan affiliation may only imperfectly map membership in racial groups. For instance, in several of the counties, the Democratic Party has the support of a large majority of black voters, while the Republican Party has the support of most white voters. However, about 30%-40% of the white voters also support the Democratic Party. The Democratic Party, therefore, does not represent interests uniquely or even mainly shared by black voters, and it is not a proxy for a distinctively black agenda. At best, this correlation is evidence only that the Democratic Party here represents a coalition supported by black voters, among others.

Opposition to such an interest group coalition is a far cry from opposition to a candidate on account of race or color. *See Terrazas v. Clements*, 581 F.Supp. 1329, 1351-52 (N.D.Tex.1984) (three-judge panel) (noting that "[t]he testimony ... suggested that partisan affiliation has, to some extent, eclipsed the importance of [racial] bloc voting in Texas politics"). Such opposition is no more than the coalition building that has been part of the politics of this nation since its founding. In sum, proof that the minority-preferred candidate is defeated because he adopts a political platform opposed by a majority of voters is not proof that the defeat was the result of racial vote dilution prohibited by § 2.

But, it is urged, plaintiffs may face insuperable barriers in trying to prove the cause of voting patterns. *Gingles*, [478 U.S. at 66-67], 106 S.Ct. at 2774. As Justice Brennan noted in *Gingles*, the 1982 amendments were enacted in large part to alleviate the difficulty of proof faced by plaintiff alleging vote dilution under Bolden. Congress made some things clear, including the fact that plaintiffs need not produce a "smoking gun" of racial bias in the original adoption or subsequent maintenance of an electoral system for their prima facie case of illegal vote dilution. See Abigail M. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights*, 120-22 (1987).

We impose no new burden of producing a "smoking gun"

on the plaintiffs. As always, the district court may infer illegal racial dilution with some circumstantial evidence of racially influenced voting by the electorate. Such circumstantial evidence may include (but is not limited to) proof of the relevant *Zimmer* factors—racial appeals, non-responsiveness of elected officials, history of discrimination, and lack of success of minority candidates. The consistent and predictable refusal of white voters to support minority candidates would also be relevant to an inference of race-conscious politics, as would extremely close correlation of partisan affiliation with race of voters.

Where the factfinder infers racial politics from some combination of these facts and also finds that such race-conscious voting interacts with some electoral practice to prevent minority voters from having an equal opportunity to elect representatives of their choice, we will not second-guess the district court's inference of racial vote dilution. Likewise, the consistent and predictable willingness of white voters to give to minority candidates of the voters' preferred party support equal or greater than the white voters give to white candidates of the same party is powerful evidence that party rather than race determines voting patterns.

B. *Texas' Interest in Defining the Judicial Office*

By making coterminous the elective and jurisdictional bases of trial courts, Texas serves uniquely judicial values of fairness and independence. At-large elections insure that trial court judges are each electorally accountable to all of the residents within the area of their primary jurisdiction. This linkage of jurisdictional and elective bases avoids the appearance, if not the fact, of favoritism—protection of their voting constituents—to the prejudice of the other litigants who frequently appear before them. *LULAC II*, 914 F.2d at 649-51 (Higginbotham, J. concurring). By insuring that judges are accountable to a broad base of all people within their primary jurisdiction rather than one narrow subsection, at-large elections protect "the fact and appearance of independence and fairness [which] are so central to the

judicial task." *Id.* at 646. Presumably for that reason the overwhelming majority of states which select trial judges by election share this structure and electoral scheme. By contrast, the systemic incentives of subdistricting "diminish the appearance if not the fact of ... judicial independence—a core element of a judicial office." *Id.* at 650.

In *Houston Lawyers'*, the Supreme Court agreed. Justice Stevens noted that Texas' linkage interest is "a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred." *Houston Lawyers'*, [___ U.S. at ___] 111 S.Ct. at 2381. *Houston Lawyers'* disagreed that this "linkage" interest should defeat liability "automatically, and in every case." Rather, the Court held that the interest is one consideration that must be weighed against other relevant factors to ascertain whether the interest "outweigh[s] proof of racial vote dilution." *Id. See also Nipper v. Chiles*, 795 F.Supp. 1525, 1548 (M.D.Fla.1992) (holding that "a state's interest in maintaining an electoral system is a legitimate factor to be considered ... in the liability phase of a section two case").

Therefore, while the Supreme Court rejected our contention that the linkage interest in all cases defeated liability under § 2 as a matter of law, the Supreme Court endorsed our position that the linkage interest is relevant to a determination of liability. Indeed, by noting that the linkage interest does not "automatically, and in every case, outweigh proof of racial vote dilution," the Court held that the state interest could outweigh what would otherwise be proof of illegal dilution and thus foreclose liability.

1. *The Weight of Texas' "Linkage" Interest*

The issue we face is determining when the linkage interest will outweigh other factors and defeat liability under § 2. In resolving this issue, we reject the polar extremes of the parties. The State of Texas and at least one defendant maintain that the interest defeats liability in every case, regardless of the other circumstances in the totality. The Supreme Court rejected this position when it held that the linkage interest does not "automatically, and in every case,

outweigh proof of racial vote dilution." *Houston Lawyers'*, [___ U.S. at ___] 111 S.Ct. at 2381.

We also reject the position of plaintiffs that the linkage interest can never defeat liability under the totality of the circumstances if "illegal" dilution is otherwise established. The plaintiffs maintain that only the *absence* of a compelling state interest in an electoral scheme is relevant to liability. According to plaintiffs, such an absence "is an optional factor" that plaintiffs can use to *support* a finding of illegal dilution; however, according to plaintiffs, the existence of a compelling interest can never *defeat* liability that is otherwise established under the totality of the circumstances. This position was also rejected by the Supreme Court. This state interest *is* to be weighed as part of the totality of the circumstances. *Houston Lawyers'*, [___ U.S. at ___] 111 S.Ct. at 2381.

Plaintiffs urge that the *Zimmer* factor of non-tenuous state policy is among the least important of the factors for determining dilution and cite *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir.1984), and *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir.1984), in support of this contention. These decisions state only that defendants cannot defeat liability by using the non-tenuous policy justification of an electoral scheme to prove that scheme "does not have a discriminatory intent." *Marengo County*, 731 F.2d at 1571. *See also Terrazas v. Clements*, 581 F.Supp. at 1345 n. 24 ("In the case of *tenuousness*, the lesser weight is consistent with the change in emphasis from intent to results. The principal probative weight of a tenuous state policy is its propensity to show pretext" (emphasis added)).

The plaintiffs' argument misses the point. The linkage interest is not urged as a non-tenuous policy to prove there was no discriminatory intent in adopting or maintaining the at-large election system. Rather, linking electoral to jurisdictional base is relevant because it serves objectively substantial interests. The plaintiffs confuse the inquiry into whether an interest is substantial with an inquiry into whether an interest is nontenuous. Proof of a merely

non-tenuous state interest discounts one *Zimmer* factor but cannot defeat liability. It does not follow, however, that proof of a *substantial* state interest cannot defeat liability. As we have explained, the Voting Rights Act largely codifies Fourteenth Amendment jurisprudence embodied in *White v. Regester*, 412 U.S. 755 [93 S.Ct. 2332, 37 L.Ed.2d 314] (1972). *Jones*, 727 F.2d at 379-80. The substantiality of the state's interest has long been the centerpiece of the inquiry into the interpretation of the Civil War Amendments and their interplay with the civil rights statutes.

Having rejected both poles of the argument—that the linkage interest either always or never defeats § 2 liability, we turn to *when* the linkage interest precludes a § 2 vote dilution violation. The weight of Texas' interest is virtually assigned by a Supreme Court decision handed down on the same day that the Supreme Court decided *Houston Lawyers'*. In *Gregory v. Ashcroft*, [___ U.S. ___, ___] 111 S.Ct. 2395, 2404 [115 L.Ed.2d 410] (1991), the Supreme Court held that the Age Discrimination in Employment Act does not apply to judicial offices in Missouri. The Court noted that "the authority of the people of the States to determine the qualifications of their most important government officials ... ' "lies at the heart of representative government." ' " *Id.* [___ U.S. at ___, 111 S.Ct.] at 2402 (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 [104 S.Ct. 2312, 2316, 81 L.Ed.2d 175] (1984)). Gregory noted that "the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment." *Id.* [___ U.S. at ___, 111 S.Ct.] at 2405. To protect this power to define the judicial office, Gregory required a clear statement from Congress for an override of qualifications imposed by the State for important state government offices. *Id.* [___ U.S. at ___, 111 S.Ct.] at 2406.

"The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform." *Id.* [___ U.S. at ___, 111 S.Ct.] at 2407. If that interest is compelling, the people of Texas have at the very

least a substantial interest in defining the structure and qualifications of their judiciary. Linking elective and jurisdictional bases is a key component of this defining effort. That the Texas interest in linkage of electoral and jurisdictional base is substantial cannot then be gainsaid.

Our confidence in this conclusion is bolstered by the recognition and pursuit of the linkage interest in other states. Courts have recognized the legitimacy and substance of similar linkage interests in Florida and Alabama. *See Nipper v. Chiles*, 795 F.Supp. 1525, 1548 (M.D.Fla.1992); *Southern Christian Leadership Conf. of Ala. v. Evans*, 785 F.Supp. 1469, 1478 (M.D.Ala.1992). Of the twenty-nine states which elect their principal trial court judges, including Texas, Alabama, and Florida, twenty-five employ district-wide elections.[2] Two others, Mississippi and Louisiana, only recently abandoned the link between jurisdiction and electoral base in order to settle prolonged litigation. The overwhelming preservation of linkage in states which elect their trial court judges demonstrates that district-wide elections are integral to the judicial office, and not simply another electoral alternative.

Thus we note now, as we noted in *LULAC II*, that the decision to make jurisdictional and elective bases coterminous is more than a decision about how to elect state judges. It is a decision of what constitutes a state court judge. Such a decision is as much a decision about the structure of the judicial office as the office's explicit qualifications such as bar membership or the age of judges. This decision preserves several values, among them a careful balance of judicial independence and judicial accountability.

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[2]Those states are Alabama, Arizona, California, Florida, Georgia, Idaho, Indiana, Kentucky, Michigan, Minnesota, Montana, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Washington, West Virginia, and Wisconsin. Some of these states appoint some trial judges, while others hold retention elections after initial selection by contested election.

On the other hand, plaintiffs' interest in full value of minority votes does not translate easily into single member districts for electing trial judges with county-wide jurisdiction. Measured by the concerns of the Act, single-member districts can create perverse results. After subdistricting, a handful of judges would be elected from subdistricts with a majority of minority voters. The price of such re-districting would be that all but a few sub- districts would be stripped of virtually all minority members. The great majority of judges would be elected entirely by white voters. Minority litigants would not necessarily have their cases assigned to one of the few judges elected by minority voters. Rather, the overwhelming probability would be that the minority litigant would appear "before a judge who has little direct political interest in being responsive to minority concerns." *LULAC II*, 914 F.2d at 650 (Higginbotham, J., concurring).

This concern does not rest on paternalism. It recognizes Texas' historic interest in having district judges remain accountable to all voters in their district. Regardless of the race or residency of particular litigants, judges make choices which affect all county residents. Texas has insisted that they answer to all county voters at the ballot box.

Unlike officers in legislatures or even judges on collegial benches who make decisions in groups, each district judge holds a single-member office and acts alone. While subdistricting in multi-member offices can enhance minority influence because members from minority subdistricts would participate in and influence all the members and decisions of the larger body, subdistricting for single-member district court judgeships would leave minorities with no electoral influence over the majority of judges in each county.

By contrast, under the present regime, minority voters participate in all judicial elections in each county. This participation gives minority voters the opportunity to influence all elections. As Justice O'Connor noted in her plurality opinion in *Gingles*, voters can wield influence over elections even when those votes are cast for losing

candidates. *Gingles*, [478 U.S. at 98- 99] 106 S.Ct. at 2791. Denying importance to this ability to influence asks that all measures of success be found in the win-loss column. This mandates proportional representation as the measure of dilution, contrary to the explicit terms of § 2. Indisputably, subdistricting would assure the absence of minority influence over the judicial process. See LULAC II, 914 F.2d at 649-50 (Higginbotham, J., concurring); *Southern Christian Leadership Conf. of Ala. v. Evans*, 785 F.Supp. 1469, 1478 (M.D.Ala.1992) (Hobbs, J.) (by subdistricting judicial positions, "black voters ... will ... be sacrificing [an] extremely valuable political right—the right to vote for all of the judges who will be serving as judges in the circuit wherein they live").

Plaintiffs contend that linking jurisdictional and elective bases does not, in fact, protect these uniquely judicial interests. All of the plaintiffs' arguments reduce to the single contention that Texas does not consistently apply the policy of linking jurisdictional and elective bases. The plaintiffs contend, for instance, that Texas district court judges often adjudicate controversies involving litigants who are not residents of the county and that Texas allows the residents of counties to 'opt out' of the linkage by selecting judges from regions smaller than a county.

We have rejected these arguments in *LULAC II* and need pause only briefly to address them here. See *LULAC II*, 914 F.2d at 651. Doing so, we note that in assessing the relationship between the end pursued and the means employed, "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Sugarman v. Dougall*, 413 U.S. 634, 648 [93 S.Ct. 2842, 2850, 37 L.Ed.2d 853] (1973). As both *Sugarman* and *Gregory* make clear, such "matters" include "the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders." *Sugarman*, 413 U.S. at 648 [93 S.Ct. at 2851]. Examining Texas' linking of electoral and jurisdictional bases in light of these

considerations, we find that it serves the substantial interests we described.

By drawing attention to venue, plaintiffs only remind us of concerns unique to the trial judge's office. Venue rules preserve judicial fairness by preventing forum-shopping and diminishing the chances of biased adjudication. At the same time, the rules keep most local matters in local courts, where judges are accountable to voters for the legal and policy choices they make. Even though district courts try some cases involving non-resident litigants, Texas' venue rules ensure that they principally handle cases related to the counties comprising their districts. This is particularly true in criminal matters, when venue is based on events related to the offense and not by reference to a defendant's domicile. Tex.Code Crim.Proc.Ann. ch. 13 (Vernon 1977). Similarly, family law matters will almost always be handled by the local district court. *See, e.g.*, Tex.Fam.Code Ann. §§ 3.21, 11.04 (Vernon 1986) (concerning venue in divorce and parent-child relationship suits). Of course quintessentially local matters such as suits against counties or disputes involving title to real property must be tried in the district court of the same county. Tex.Civ.Prac. & Rem.Code Ann. §§ 15.001, 15.015 (Vernon 1986). The argument that Texas' venue rules somehow abrogate its interest in linking jurisdiction and electoral base is illusory.

Likewise, the contention that Texas abandoned its interest in linkage by allowing voters to approve the creation of districts smaller than counties is without merit. As Chief Justice Phillips explained at trial, this provision was merely part of a constitutional and statutory scheme designed to equalize court dockets by allowing the realignment of judicial districts. The 1985 amendment states that a district smaller than a county may not be created unless approved by a majority of county voters. Tex.Const. art. V, § 7(a)(i) [7a(i)]. In none of Texas' 254 counties have voters voted to break the link between jurisdiction and electoral base. In no district has the linkage been abandoned.

Moreover, even if one county were to subdivide, the

interest in linkage would not be lost in the state as a whole. In *Mahan v. Howell*, 410 U.S. 315 [93 S.Ct. 979, 35 L.Ed.2d 320], *modified* 411 U.S. 922 [93 S.Ct. 1475, 36 L.Ed.2d 316] (1973), the Court recognized that although Virginia divided one county when reapportioning its state legislature, it retained its interest in preserving boundaries of all other political subdivisions. *Id.* at 327 [93 S.Ct. at 986]. Texas' interest in preserving the structure of its judiciary by linking jurisdictional and electoral boundaries is even greater than a state's interest in observing boundaries in legislative reapportioning.

In finding that Texas' interest is substantial, we recognize that it will not always defeat § 2 liability. Substantiality is not quantifiable, and we translate its force in the practical world of trials to the burden required to overcome it. As we see it, plaintiffs cannot overcome a substantial state interest by proving insubstantial dilution. We hold that the totality of all circumstances besides the state interest must sum to substantial proof of dilution and do so convincingly if they would overcome the state's linkage interest. As a matter of law, Texas' interest cannot be overridden by a totality of circumstances that sum to a marginal case. It will take more to create a fact issue for trial.

We do not now attempt to define in detail what sort of proof of dilution would be substantial enough to override the state's linkage interest. We do not change the nature or usual means of proof. The *Zimmer* factors remain relevant. In particular, proof of racial appeals in elections, non-responsiveness of elected officials to minority voters, and persistent lack of electoral success by minority candidates must all be considered. We also look to the degree and nature of racial bloc voting to see if such voting patterns suggest racial bias in the electorate.

Two facts are especially relevant to assessing the substantiality of the plaintiff's proof of dilution: first, the willingness of the racial or ethnic majority (in this case, white voters) to give a majority of their votes to minority candidates, and, second, the ability of the racial or ethnic

minority to elect candidates of their choice even when opposed by a majority of votes from the racial or ethnic majority. Where the dominant racial or ethnic group repeatedly casts most of its votes for members of racial or ethnic minorities, the likelihood is that racial bias (as opposed to ideological difference) is not an insurmountable obstacle to coalition-building. Likewise, where the racial or ethnic minority is large enough repeatedly to elect candidates of its choice even when opposed by the racial or ethnic majority, one cannot conclude that the minority is incapable of influencing elections because it is submerged in a sea of hostile voters. In either case, the plaintiff's proof of dilution may, as a matter of law, be too insubstantial to overcome the state's substantial interest, even if it might be sufficient to establish liability absent that interest.

2. *Weight of Texas' interest is a legal question, not a question of fact*

The plaintiffs urge that whether Texas' linkage interest is substantial is a matter of fact for the district court to decide in the first instance. The plaintiffs contend that we may review such a factual determination only for clear error. We disagree.

The Supreme Court has held that the ultimate finding of dilution is a factual matter reviewable only for clear error. A substantial state interest is not inherently preclusive of dilution and is not raised to disprove the existence of dilution. Rather, the state's interest is weighed *against* proven dilution to assess whether such dilution creates § 2 liability. *Houston Lawyers'*, [___ U.S. at ___] 111 S.Ct. at 2381 (weighing of linkage interest on remand goes to determination of whether interests "outweigh[s] proof of racial vote dilution").

The weight to be assigned to a state's interest under the Fourteenth Amendment has always been a legal question, not a factual question. The determination of the substantiality of Texas' linkage interest under the Voting Rights Act, a statute enacted to enforce the guarantees of the Civil War Amendments, is analogous. We hold that the

determination of substantiality of Texas' interest under § 2 is a question of law for this court to determine de novo and not a question of fact that somehow will be described on a county-by-county basis.

3. *Absence of less restrictive means to accommodate the linkage interest*

Plaintiffs urge that the linkage interest can be accommodated through a scheme of single-member districts, by making the district court judges' area of primary jurisdiction co-extensive with the single-member district from which the district court judge is elected. They provide no evidence that such a radical re-working of the venue of Texas courts would be administratively feasible. The district court likewise simply asserted that such an arrangement of venue limited to a single-member district could accommodate Texas' interests, without a glance at the feasibility of such an arrangement. A glance at Harris County cut into a grid of fifty-nine venue squares is enough to show the bizarre nature of this proposal. Enough time and money is already wasted arguing over which county's courts should try a suit, without the venue depending upon in which voting precinct an event occurred.

We cannot conclude that Texas' interests could be adequately accommodated by such a radical re-working of Texas venue rules. The proposal illustrates how different the judicial offices' at-large election scheme is from legislative and executive at-large elections. Plaintiffs propose essentially that the district court eliminate Texas venue rules and replace them with rules of the district court's own creation. The very necessity for the proposal is a powerful testament to the reality that linkage is an essential part of the structure of the judicial office, much more than the method by which the holder of the office is elected.

C. *Relevance of Elections with Hispanic Candidates To Black-Preferred Candidates' Success*

In determining the success of the black-preferred candidate as required by *Gingles*, the plaintiffs examined only those elections in which black candidates participated.

Thus, in Harris, Tarrant, Jefferson, and Dallas counties, the plaintiffs ignored the success of the minority-preferred candidates in elections in which Hispanics had run. The district court seems also to have discounted the importance of these white-Hispanic elections.

The district court also found, however, that black and Hispanic voters were a single cohesive minority group in three counties (Midland, Lubbock, and Ector), apparently because the members of the two minority groups generally voted for the same candidates. Taebel studied a number of elections in each county and determined the percentage of black and Hispanic votes cast for the minority/winning candidate. In Midland County, of the 8 elections Taebel studied, the black and Hispanic voting percentages were within 10% of each other 4 times. In Lubbock County, 6 out of 7 elections showed blacks and Hispanics voting together within 10%. In Ector County, blacks and Hispanics voted within 10% of each other in only 2 out of 10 elections.

The district court made no findings as to whether black and Hispanic voters were also a cohesive group in other counties. However, nothing in the record suggests that black and Hispanic voters were not equally cohesive outside Ector, Midland, and Lubbock counties. Indeed, in Harris and Tarrant Counties, the undisputed data in Taebel's studies show that a large majority of both Hispanics and blacks usually supported the same candidates. In Harris County, Taebel studied 46 elections. In 35 of these, the black and Hispanic vote percentages were within 10% of each other. Out of 17 elections in Tarrant County, 13 involved blacks and Hispanics voting for the same candidate within 10%. Thus, the record shows that blacks and Hispanics were actually more cohesive in Harris and Tarrant County than in Midland and Ector, two out of three counties in which the district court made a finding of cohesion.

If black and Hispanic voters form a cohesive minority group in counties outside Ector, Midland, and Lubbock, then the district court clearly erred in ignoring races with Hispanic candidates in assessing the success of the black-

preferred candidate. This court has held that elections between white candidates alone are generally less probative in determining the success of the minority-preferred candidates, because such elections do not give minority voters the choice of a viable minority candidate. *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir.1988) ("The district court was warranted in its focus on those races that had a minority member as a candidate"); *Citizens for a Better Gretna* v. City of *Gretna*, 834 F.2d 496, 503 (5th Cir.1987). As we noted in *Gretna*, "*Gingles* is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter—but only within the context of an election that offers voters the choice of supporting a viable minority candidate." *Gretna*, 834 F.2d at 503.

Gretna does not explain which elections are relevant in determining the success of the black-preferred candidate in communities where black and Hispanic voters vote cohesively. However, if black and Hispanic voters are truly a cohesive minority group, then logic requires that the district court consider elections with Hispanic candidates, because Hispanic candidates would count as members of this bi-minority "group." If black and Hispanic voters are, in effect, a single minority group with ccmmon "social, economic, and political interests," *League of United Latin American Citizens v. Midland Indep. School Dist.*, 812 F.2d 1494, 1501 (5th Cir.1987), then elections with a viable candidate from this single minority group constitute elections with a "viable minority candidate" within the meaning of *Gretna*.

This panel is not free to examine afresh whether Hispanic and black voters ought to be treated as a single minority group under § 2 of the Voting Rights Act. Both judicial opinions and commentators have suggested that such treatment of different ethnic groups as fungible for the purposes of § 2 is contrary to the purposes of the Voting Rights Act and flies in the face of political reality. *See, e.g., Midland I.S.D.*, 812 F.2d at 1505-07 (Higginbotham, J.,

dissenting); Katherine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 Pacific L.J. 619, 641-57 (1990).

The law of this circuit, however, is that black and Hispanic voters can form a cohesive minority group under *Gingles*. *Midland I.S.D.*, 812 F.2d at 1501. We hold that, where black and Hispanic voters are cohesive, elections with Hispanic candidates present black voters with the option of supporting a viable minority candidate within the meaning of *Gretna*. Therefore, where Hispanics and blacks vote cohesively, it is error not to examine elections with candidates of either group in assessing the success of either black- or Hispanic-preferred candidates.

Plaintiffs contended at oral argument that blacks and Hispanics are cohesive only in those counties where the plaintiffs proceeded on behalf of the combined minority voters in the county. If blacks and Hispanics are cohesive for the purposes of *Gingles*, however, they are cohesive regardless of the plaintiffs' litigation strategy. Cohesion is a political and social fact, not a matter determined by the plaintiffs' pleadings. Plaintiffs essentially urge that Hispanic and black voters are cohesive only when such cohesion is beneficial to the plaintiffs' proof. Such an approach is illogical and insupportable, if understandable.

The undisputed facts show that blacks and Hispanics are just as cohesive in Harris and Tarrant Counties as in Midland, Ector, and Lubbock Counties: the voting patterns in all five counties were not different in any relevant respects. The district court, therefore, clearly erred in ignoring elections with Hispanic candidates in determining the success of the black-preferred candidate in Harris and Tarrant Counties.

D. *Relevance of Small Number of Minority Lawyers*

Undisputed evidence shows that in all of the counties, the percentage of minority lawyers was much smaller than the percentage of minority voters. In Ector County, for example, there appear to be six minority lawyers eligible for district judgeships.[3] It is true that we have refused "to preclude vote dilution claims where few or no [minority] candidates have sought offices in the challenged electoral system." *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1208 n. 9 (5th Cir.1989). That holding is a far cry from the conclusion that the number of minority candidates eligible to run has no relevance. Section 2 and the Senate Report instruct us to consider the number of minority candidates elected to office. At the same time, we are instructed to look at the totality of the circumstances, which includes the fact that few minority citizens can run for and be elected to judicial office. Our functional analysis of the electoral system must recognize the impact of limited pools of eligible candidates on the number of minority judges which have resulted. *See Southern Christian Leadership Conf. of Ala. v. Evans*, 785 F.Supp. 1469, 1476-77 (M.D.Ala.1992).

District judges in Texas must be licensed attorneys. Tex. Const. art. V, § 7. As a result, relatively few minority citizens are eligible to run for this office. Consider Tarrant County, where black lawyers comprised only 2.4% of eligible attorneys in 1989. From 1985 to 1989, however, between 8% and 13% of Tarrant County district judges were black. In four counties, Dallas, Harris, Tarrant, and Bexar, the percentage of minority judges exceeds the percentage of minority lawyers. The absence of eligible candidates goes a long way in explaining the absence of minority judges. Plaintiffs here cannot emphasize the scarcity of successful minority candidates to support their dilution claims and

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[3]Lawyers must be licensed in Texas for four years and resident in the district for two years to be eligible for district court judgeships.

simultaneously urge that the number of minorities eligible to run is not relevant. The district court erred by dismissing the significance of the paucity of minority lawyers.

III. *Application of Law to Each County*

We now turn to the application of these principles of law in each county. The district court's findings of dilution were based upon erroneous legal principles and cannot be relied upon. Considered in light of the controlling standards, the evidence admits of only one conclusion in each county: no violation of § 2. Therefore, we reverse. We reach our conclusions, however, by different routes in different counties. In six counties (Dallas, Tarrant, Travis, Midland, Ector, and Lubbock), we find that the district court erred in finding proof of dilution, regardless of Texas' linkage interest. In four of those counties (Dallas, Ector, Midland, and Lubbock), the overwhelming evidence showed that partisan affiliation, not race, explained the results. In the three remaining counties (Harris, Bexar, and Jefferson), we assume that the evidence may have sufficed to show dilution absent the state's substantial interest. The proof of dilution, however, was so insubstantial that it was outweighed by Texas' linkage interest as a matter of law.

One thread runs throughout the plaintiffs' case in all of the counties—the insubstantiality of the plaintiffs' proof that the minority- preferred candidate lost "on account of race." Except in Dallas County, the district court's finding of such racial dilution was based on only three findings. These were according to the district court, (1) proof of the *Gingles* factors; (2) general history of discrimination in the counties; and (3) underrepresentation of minorities in the state judiciary of each county. This evidence was supplemented by proof of some "enhancing" *Zimmer* factors (large districts, anti-single shot voting, etc.). In Dallas County, the district court also found two instances of racial appeals.

As we explain in more detail below, this evidence of dilution by itself is slender, barely amounting to a proof that any minority-preferred candidate lost on account of race.

We are persuaded that it is outweighed by Texas' linkage interest.

A. *Dallas County*

The voting age population of Dallas County is 1,106,757. Of this number, 180,294 (16.3%) are black, and 90,966 (8.2%) are Hispanic. Plaintiffs proceed on behalf of the black voters in Dallas County. In 1989 there were 36 district court judges in Dallas County. Until 1987, there were no black district court judges. In 1987 and 1988, there were three black district court judges or 8.3% of the total and in 1989, there were two or 5.5% of the total. There were also two black county court judges elected at-large in Dallas County. The defendants' undisputed expert testimony and surveys showed that black lawyers made up at most 2.2% of the lawyers residing in Dallas County.

The undisputed expert evidence demonstrated that 99%-100% of black Dallas voters support the Democratic candidate in every judicial election. The evidence also indicated that the majority of the white voters always voted for the Republican, and thus for candidates other than the black-preferred Democratic candidate.

As a result of these voting patterns, the black-preferred Democratic candidate always lost in judicial elections, regardless of the year of the election in Dallas County. The Republican Party dominated every analyzed judicial race. Defendants understandably contend that the defeat of black-preferred candidates is the result of partisan affiliation rather candidates' race. According to defendants, elections are determined by straight-party voting in which voters support their party's ticket regardless of the race of the candidates. The undisputed facts overwhelmingly support this assertion.

Taebel and Engstrom analyzed seven district court general elections with black candidates. The following is a summary of the election results as they appear in the record. The underlined candidate is the black candidate. The first figure represents the non-black vote as estimated by plaintiffs' expert. The range is defined by the homogenous

precinct and bi-variate regression analysis performed by Engstrom. The second figure, in parentheses, represents the white vote as estimated by Taebel. Taebel did not analyze the 1984 Tinsley-Maloney race.

Year	Election	NB vote (white vote)
1980	Winn (Dem.) Howell (Rep.)	38.6-39.7% (36%)
1984	Baraka (Rep.) Metcalfe (Dem.)	60.6-61.8% (61%)
" "	Tinsley (Dem.) Maloney (Rep.)	28.7-30%
" "	White (Dem.) O'Donnell (Rep.)	30.6-31.9% (31%)
1986	Tinsley (Dem.) Kendall (Rep.)	36.6-37.5% (31%)
" "	Wright (Rep.) Brin (Dem.)	70.6-71.7% (77%)
1988	Oliver (Dem.) Brown (Rep.)	36.9-37.9% (38%)

Roughly 61%-77% of white voters consistently support Republicans, even when black Republicans run against white Democrats. Virtually all black voters supported the Democratic candidate, even when the Democratic candidate was white, running against black Republicans.

Moreover, white support for Republicans remained constant, even when the Republican was black. Black Republicans won in two of the seven analyzed district court races. According to Taebel's study, one of these Republicans, Carolyn Wright, did better among white voters

than any other Republican, white or black, winning 77% of the white vote. Even Engstrom's study shows Wright doing better among white voters than most white Republicans, receiving between 70% and 72% of the white vote. Other black Republicans received percentages of the white vote comparable to those received by white Republicans. Judge Baraka, the other black Republican district court candidate, took about 61% of the white vote against a white Democrat. County Judge Brashear, a black Republican, took 66% of the white vote in his successful race for a county court judgeship against a white Democrat.

Just as black Republicans did as well as or better than white Republicans, so too, black Democrats won as large a percentage of the white vote as white Democrats. The white vote for Democratic candidates ranged between 23% to 39%. According to plaintiffs' exhibits, black Democrat Oliver won about 38%—a larger than average share of the white vote for a Democrat. Winn, another black Democrat, received as much as 39% of the white vote. By comparison, white Democrat Brin received no more than 29% of the white vote when running against Wright, a black Republican.

Republican candidates lost the black vote and won the white vote regardless of their public positions on matters related to race. Judge Carolyn Wright, for instance, had been a member of the Dallas Chapter of the Coalition of 100 Black Women, served as a legal intern for the Lawyer's Committee on Civil Rights, a project related to civil rights in South Africa, and was a charter member and past vice-chair of the National Political Congress of Black Women. By contrast, the record is silent regarding the record of Wright's opponent, Brin. He nevertheless won the black vote handily in the general election.

Professor Anthony Champagne, defendants' expert witness, testified that this voting pattern was the result of straight-ticket voting. According to Dr. Champagne, judicial elections are low-profile elections in which the voters know little more about the candidates than what they read on the ballot. The voters, therefore, will make their choice based

on the information that the ballot contains—which means party affiliation. Because a majority of voters in Dallas are Republican, Republicans tend to prevail in most of the races.

Engstrom did not control for partisan affiliation in his study of Dallas county voting patterns. The district court also made no finding that partisan affiliation did not determine election outcomes, but instead held that the cause of voting patterns was irrelevant under *Gingles*.

We are persuaded that the undisputed facts indicate that the defeat of the black-preferred candidate was the result of the voters' partisan affiliation, not the result of race. The black-preferred candidate was always the Democratic candidate, while the majority of white voters always supported the Republican candidate. Although between about 30%-40% of the white voters supported the Democratic candidate, the combination of black and white Democratic votes was insufficient to cause the Democratic candidate to prevail. Black and white Democratic voters alike were, therefore, unable to elect any Democratic judicial candidates. Plaintiffs have therefore failed to establish racial bloc voting as required by *Gingles*.

As we noted above, the race of the candidate did not affect the pattern. White voters' support of black Republican candidates was equal to or greater than the support that white voters gave to white Republicans. Likewise, black and white Democratic candidates received equal percentages of the white vote. Given these facts, we cannot see how the minority-preferred candidate was defeated "on account of race or color." Rather, the minority-preferred candidates were consistently defeated because they ran as members of the weaker of two partisan organizations.

The plaintiffs contend that the Democratic Party better represents the political views of black voters in Dallas County. This contention, if true, is not relevant to whether the minority-preferred candidate is defeated on account of race. To the extent that black voters' preferred candidates are consistently defeated—because of their substantive

political positions, they are simply the casualties of interest group politics, not racial considerations. This is not the harm against which § 2 protects. Section 2 protects black voters against defeat of the minority-preferred candidate on account of race or color, not on account of political platform. See *Whitcomb*, 403 U.S. at 154-55 [91 S.Ct. at 1874-75]. We do not deny that political positions can be proxies for racial prejudice. See *Gingles*, [478 U.S. at 66-67] 106 S.Ct. at 2774. However, where white voters support black candidates of a particular party in larger percentages than they support white candidates of the same party, there is no basis, without more, for us to conclude that the parties' political positions are proxies for racial bias.

Even assuming *arguendo* that plaintiffs have met the *Gingles* threshold by showing bloc voting, the totality of circumstances in the record cannot support a § 2 violation. Plaintiff-intervenors Oliver, White, and Tinsley contend that "race considerations pervade elections in Dallas County." They support this proposition with the district court's finding that there were two instances of overt or subtle racial appeals in Dallas County elections. In one, Larry Baraka was called a "Black Muslim" by his opponent. In another, Vance, a candidate for district attorney, printed his opponent's picture in campaign literature, thus informing the electorate that Vance was running against a black opponent. Nothing in the district court's opinion indicates that these racial appeals were anything more than isolated incidents. In the only judicial election affected by a racial appeal, the black candidate, Baraka, won both the Republican primary and the general election, winning a majority of the white vote in both elections.

Oliver, Tinsley, and White also contended at trial that voting patterns in non-partisan elections show that partisan affiliation could not explain the defeats of black-preferred candidates. They produced data from seven Dallas City Council elections, one Democratic Presidential primary, and four ballot issues to support this contention. The district court made no findings about this data, and the parties do

not discuss it in their briefs on appeal.

Assuming *arguendo* that these high-profile elections had any relevance to voting patterns in low-profile judicial elections, we find that the data presented does not support the plaintiffs' argument. The data shows that the candidate favored in predominantly black areas of Dallas prevails in four out of seven City elections and wins the highest plurality (46%) in the Presidential primary. If this data proves anything, it shows that, when one controls for partisan affiliation, the minority-preferred candidate is not defeated and wins the majority of the white vote in most elections.

All other evidence indicated that racial politics played no role in the minority-preferred candidates' defeat. The district court rejected the suggestion that the Republican Party was a white slating organization. The undisputed testimony shows that any eligible candidate could run as a Republican, and plaintiff-intervenors themselves testified at trial that they had been heavily lobbied by the Republican Party leadership to do so. The plaintiffs presented general evidence of the lingering effects of past discrimination, but no specific evidence of depressed levels of black political participation such as low black voter registration or turn-out.

On the contrary, the minority-preferred candidates ran professional, well- financed campaigns backed by the Democratic Party, a party that, until the late 1970's, had dominated Dallas County judicial races just as completely as the Republican Party now dominates those races. These Democratic candidates lost because Dallas County had shifted from being a county of predominantly Democratic straight-ticket voters to a county of mostly Republican straight- ticket voters.

Plaintiffs made no substantial factual riposte to the overwhelming evidence that election outcomes were the product of partisan affiliation. Rather, plaintiffs' answer was the legal assertion that the effect of partisan affiliation, virtually admitted, was not relevant. Plaintiffs' own Dr. Engstrom conceded that there is "a stronger association

between partisan affiliation and success than there is between the race of the candidate and success." Dr. Engstrom asserted that partisan affiliation did not explain all of the voting patterns in Dallas County. However, he conceded that he had no data that black Democrats generally did worse than white Democrats. In fact, the undisputed facts show that, when one controls for party, black candidates did as well as, *or better than*, white candidates in winning the white vote and elections. Plaintiff-intervenor Judge White conceded that partisan affiliation determined her electoral defeat. She admitted that "if I ran as a Republican ... the likelihood is that I would win."

In short, the undisputed facts show that the defeat of the minority- preferred candidate was the result of the voters' partisan affiliation. The district court erred in finding racial vote dilution.

B. *Harris County*

Harris County elects 59 district court judges at-large. At the time of trial, three were black, three were Hispanic, and the rest were Anglo. Defendants produced uncontested expert testimony and surveys which established that black lawyers make up at most 3.8% of the lawyers residing in Harris County but comprised 5.1% of Harris County's district judges. There was also one black county court judge in Harris County who was elected at-large. According to plaintiffs' evidence, 1,685,024 people of voting age reside in Harris County; 305,986, 18.2%, are black, and 222,662, 13.2%, are Hispanic. Plaintiffs claim to represent all black voters in Harris County.

Defendants' expert, Taebel, studied Harris County judicial elections between 1980 and 1988 with either a black or Hispanic candidate. Taebel's study covered 24 district court elections, 9 county court elections, one court of appeals election, one Supreme Court election and ten primary elections. Plaintiffs' expert, Engstrom, studied 17 district court elections with a black candidate in Harris County. All but two of Engstrom's elections were included

in Taebel's study. Neither Taebel nor Engstrom analyzed all of the judicial races in which blacks or Hispanics ran. There was evidence in defendant Judge Sharolyn Wood's exhibits that minority candidates participated in 42 races between 1980 and 1988, including six omitted by Taebel and Engstrom.

Engstrom studied 17 judicial races with black candidates between 1980 and 1988. The black-preferred candidate won three, about 17.65%. County court judges also run in county-wide races. The jurisdiction of county court is also county-wide but is limited to smaller cases than the listed courts. If we include races for county court judgeships with black candidates, races that Engstrom apparently ignored, the black-preferred candidate prevailed in five out of twenty-three races—21.74%.

Curiously, plaintiffs' study ignores judicial races with Hispanic candidates. Taebel's study includes some of these races, and Judge Sharolyn Wood's exhibits include all of them. In the judicial races with black or Hispanic candidates, the black-preferred candidate won 15 of 37 races or about 40.5% of the time. Eliminating the two exogenous races for Supreme Court posts by Gonzalez in 1986 and 1988, the minority-preferred candidate still prevailed 37.143% of the time.

These percentages do not fully reflect the success of minority-preferred candidates. The black-preferred candidate was sometimes neither black nor Hispanic. Partisan affiliation always trumped race in predicting which candidates would be supported by white voters. For instance, when black Republican Mamie Proctor was defeated by white Democrat Schuble in her 1986 race for a district court judgeship, Proctor won the majority of the white vote, but lost the vast majority of the black vote to Schuble, the black- preferred candidate. Likewise, when Cheryl Irvin, another black Republican, ran against Duncan, a white Democrat, for a county court judgeship, she won the white vote, but Duncan received virtually all the black vote. Judge Kenneth Hoyt, now a United States District Court

Judge, won the white vote and the election (as well as the endorsement of the *Houston Lawyers'* Association) but lost virtually all of the black vote in his race as a black Republican against a white Democratic opponent for a position on the state appellate bench.

In 1980, 1984, and 1988, years in which popular Republican presidential candidates ran, Republicans defeated virtually all Democrats and, thus, black- preferred candidates. In 1982 and 1986, however, the black-preferred candidates won eight out of the twelve races in which black candidates participated. In races with a Hispanic candidate, the black-preferred candidate won 22 out of 36 races. The black-preferred candidates enjoyed consistent success of 20% or 40% victory, looking respectively to races with black candidates only and elections with both Hispanic and black candidates. The black-preferred candidate was the Democratic candidate in every election in every county. Defendants buttressed these facts with expert testimony that the defeat of both white and black Democrats was the result of straight-ticket voting. According to defendants, both white and black judicial candidates, whether Democratic or Republican, fared according to the popularity of ticket leaders. Defendants contended that the race of the candidate was irrelevant to the outcome of judicial elections. The black-preferred, that is Democratic, judicial candidate would win when the more visible Democratic candidates were strong and would do poorly when the Republican ticket was headed by a popular presidential candidate.

Undisputed data in the parties' studies provides substantial support for defendants' theory. The black-preferred Democratic candidates' success varied with the year of the election. According to the data, in 1980, 1984, and 1988, when the Republican ticket was headed by popular presidential candidates, all but one Republican judicial candidate, including one black Republican, won, and Democrats lost. In 1982 and 1986, when either Governor Mark White or Senator Lloyd Bentsen headed the Democratic ticket, the success at the top of the ballot

carried down to judicial races more marked by anonymity than name identity.

Defendants further note that the Republican candidate always won the white vote and the Democratic candidate won the black vote, regardless of that candidate's race or the race of his opponent. Republicans always won a majority of the white vote, generally taking between 55% and 65% of the white vote regardless of whether the Republican candidate was black, Hispanic, or white. Similarly, Democratic candidates always took virtually all of the black and Hispanic vote, even when a white Democratic candidate ran against a black or Hispanic Republican.

It does not follow from this data, however, that black candidates did as well as white candidates, even if one controls for partisan affiliation. According to Judge Sharolyn Wood's exhibits, of 22 black Democrats only three were elected, about 13.64%. By contrast, white Democrats won four out of five, 80%, of their races. Indeed, again according to Judge Wood's exhibits, four out of six black Democratic candidates, Berry, Fitch, Fisher, and Lee, lost in 1986, a year in which all other Democrats won. The undisputed testimony also indicated that Francis Williams, a black Democrat not included in Judge Wood's exhibits, also lost his race in 1986. All of the defeated black Democrats were incumbent judges. In short, black Democratic candidates did not fair as well as white Democratic candidates in the elections studied.

The district court made no findings about the cause of the defeat of the black or black-preferred candidates for judicial posts. Instead, relying on Justice Brennan's opinion in *Gingles*, the district court incorrectly held that the actual cause of the defeats of the black-preferred and black candidates was legally irrelevant in a § 2 vote dilution case.

Nonetheless, we will assume *arguendo* that the district court could infer dilution from the evidence of elections in Harris County. We will also assume that, absent Texas' substantial interest in its at-large system, such dilution might create liability under § 2. The question remains whether

such assumed proof of dilution is sufficient to overcome Texas' interest in linking electoral and jurisdictional bases of trial court judges.

The district court found dilution based from the three *Gingles* factors, two primary *Zimmer* factors, and three "enhancing" *Zimmer* factors. The primary *Zimmer* factors were (1) the general history and lingering socio- economic effects of past discrimination and (2) the underrepresentation of minorities in the judiciary. The enhancing *Zimmer* factors were (1) the large size of Harris County; (2) the prevention of single shot voting by numbered post election; and (3) the majority runoff requirement in primary elections.

Assuming that this proof sufficed to show dilution absent Texas' substantial interest, we find the proof to be marginal. The undisputed facts show that a majority of white voters invariably supported black Republican candidates and that black voters could repeatedly elect their preferred candidates even when opposed by a majority of white voters. In the absence of any substantial evidence of racial politics, any possible inference that the minority-preferred candidate lost on account of race would be tenuous. As a matter of law, Texas' linkage interest must outweigh such a tenuous case.

First and most significantly, white voters repeatedly support black Republican candidates, showing that the defeat of minority-preferred candidates was substantially, although perhaps not entirely, caused by partisan affiliation. Kenneth Hoyt, Mamie Proctor, and Cheryl Irvin, black Republicans, all won a majority of the white vote; Proctor and Irwin lost elections because black voters gave virtually all of their votes to the white Democratic candidates. In the Democratic primaries where party affiliation plays no part, blacks actually did better than white candidates, winning 70% of their contested races.

In addition to evidence of partisan affiliation, minority-preferred candidates had substantial success in winning elections, even when they were opposed by a majority of white voters. The undisputed facts showed that

minority voters elected the candidate of their choice in 13 out of 37 analyzed non-exogenous elections in which either black or Hispanic candidates participated—37.14% of the time.

Minority voters could, therefore, repeatedly elect candidates of their choice, even when opposed by a majority of white voters. Far from being submerged in a white majority, black voters were a potent electoral force that could form coalitions with minorities of white voters to elect their preferred candidates. This ability to form coalitions and influence the elections of *all* judges in Harris County would be lost in the system of single-member districts proposed by the plaintiffs. Instead, black voters would receive the right to elect nine judges, abdicate any right to vote for the balance of fifty, and thus radically reduce the chances of having their disputes decided by a judge over whom they had any influence. As we stated, absent clear evidence that the at-large vote is meaningless because of racial politics, such a result is perverse.

The remaining evidence adds little to plaintiffs' claims of illegal vote dilution. The district court cited these *Zimmer* factors: (1) the general history and lingering effects of discrimination in Harris County, (2) the underrepresentation of blacks on the Harris County bench, and (3) the consistent defeat of the minority-preferred candidate by the majority of white voters.

The lingering effects of past discrimination can "exacerbate the effects of a racially or ethnically polarized electoral process" by reducing minority registration, voting, and general political participation. *Terrazas*, 581 F.Supp. at 1346 n. 26. *See also White v. Regester*, 412 U.S. 755, 768 [93 S.Ct. 2332, 2340, 37 L.Ed.2d 314] (1973); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir.1977) (en banc). However, while past discrimination exacerbates racial politics otherwise proven, it is at best weak circumstantial evidence of racial politics. The legislative history of the 1982 amendments indicates that such past discrimination by itself does not support an inference of dilution. *See* S.Rep. 417 at

34 ("mere existence of underrepresentation plus a history of dual schools" is insufficient to show dilution under *White/Zimmer* test), *reprinted in* 1982 U.S.Code Cong. & Admin.News at 212. *Whitcomb* also suggests that evidence of black poverty alone, even when combined with polarized voting, does not prove dilution: in *Whitcomb*, the Supreme Court did not dispute the three-judge panel's finding that black residents in the so-called "ghetto" area suffered from poor housing, high unemployment, and other burdens of poverty. *Whitcomb*, 403 U.S. at 132 [91 S.Ct. at 1863].

Moreover, if lingering effects of past discrimination in combination with polarized voting could prove dilution, then proof of the three *Gingles* factors would virtually always suffice to establish § 2 liability, because there are few if any communities in the United States that do not still suffer from the economic effects of racism. Allowing proof of the effects of past discrimination alone to prove dilution under the totality of circumstances would make a mockery of the "totality of the circumstances" inquiry. Far from being intensely local, such inquiry would involve no more than judicial notice of the obvious.

In Harris County, the plaintiffs presented no evidence that general black poverty has reduced levels of black registration or black voters' turnout. Indeed, there is no record evidence that black voters' registration or turnout is lower than white registration or turnout. We do not presume that past discrimination causes lower turnout or registration of minority voters. S.Rep. 417 at 29 n. 114 ("The courts have recognized that disproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, *and where the level of black participation in politics is depressed*, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation" (emphasis added)), *reprinted in* 1982 U.S.Code Cong. & Admin.News at 207 n. 114; *see also McIntosh Cty. NAACP v. City of Darien*, 605 F.2d 753, 759

(5th Cir.1979). Given the lack of any evidence that a smaller percentage of black voters register and vote than white voters, plaintiffs have failed to show even that past discrimination has deprived black voters of equal access to the political system.

Likewise, the representation of blacks on the Harris County bench cannot support an inference of racial politics. Three blacks were district court judges in 1989—5.1% of the total. By contrast, black attorneys make up at most only 3.8% of the attorneys in Harris County. The fact that blacks occupied a smaller percentage of the bench than the black voters' percentage of Harris County's population, therefore, is not surprising: if judges were chosen at random from the pool of eligible candidates, there would be fewer black judges on the Harris County bench.

Aside from the number of blacks on the Harris County bench and the general history of discrimination, the district court found three *Zimmer* enhancing factors. *See Nevett v. Sides*, 571 F.2d 209, 218 (5th Cir.1978). Such factors enhance the opportunity of a white majority to engage in racial politics. However, they do not "meaningfully advance the inquiry into whether race is at issue," *Terrazas*, 581 F.Supp. at 1346 n. 26, and therefore cannot support an inference of racial politics.

The circumstantial evidence of a relation between defeats and race is, at best, tenuous, given the willingness of white voters to support black Republican candidates and substantial success enjoyed by minority-preferred candidates. We express no opinion as to whether this minimal proof of dilution shows a violation of § 2 absent Texas' linkage interest. Assuming without deciding that it does, we find that plaintiffs' proof at best produces only a marginal case in Harris County too insubstantial to outweigh Texas' linkage interest, as a matter of law.

C. *Tarrant County*

There were 23 district courts in Tarrant County in 1989. In 1985, 1986, 1987, and 1988, three of these judges (over 13%) were black. In 1989, two district court judges were

black (8.7%). The defendants' undisputed testimony and surveys indicated that only 2.4% of the Tarrant County Bar is black. There are 613,698 residents of voting age in Tarrant County. Of this number, 63,851 (10.4%) are black. Plaintiffs proceed on behalf of black voters in Tarrant County.

The evidence indicated that blacks voted cohesively for the Democratic candidate. Brischetto, plaintiffs' expert, analyzed four elections, three of which were general elections for district judgeships and one of which was the Democratic presidential primary of 1988. In all four elections, the regression estimates show that from 85% to 100% of Tarrant County blacks voted for the black-preferred and Democratic candidate. Taebel's analysis is substantially the same.

Taebel analyzed nine general elections, including three exogenous elections, in which a black or Hispanic had participated. Brischetto analyzed only those elections in which a black candidate had participated—three general elections for state district court judge and one Presidential primary. As in all other counties, the evidence showed that black voters voted cohesively for Democratic candidates. Unlike other counties, however, black judges made up more than 13% of the Tarrant County bench for four out of five years—a proportion of the bench that is greater than the proportion of black voters in the County's population.

The success of the black-preferred candidate was also greater in Tarrant County than in other counties. In those general elections with black candidates, the black-preferred candidate, always the Democratic candidate, won only one out of three general elections—33.3% of the studied races. However, in nine general elections with Hispanic candidates included in Taebel's study, the black-preferred candidate won four out of nine, or 44.4% of the elections. In the six non-exogenous district and county court elections included in Taebel's study, the black-preferred candidate won three out of six, or 50% of the elections.

Brischetto includes the 1988 Democratic presidential

primary in which Jesse Jackson won virtually all of the black vote in Tarrant County but received between 14% to 16% of the white vote.[4] Taebel's study also includes a 1986 Democratic primary for state district court in which Ross, the black- preferred candidate, received 57% of the black vote but lost the white vote and thus came in third out of a field of four candidates. Brischetto ignores the two Democratic primaries in which black-preferred Hispanic candidates prevailed.[5]

In short, the evidence shows that the black-preferred candidate won 40% of the Democratic primaries and half of the non-exogenous judicial elections, including elections with Hispanic candidates. The record also shows that black judges have consistently made up a greater proportion of the Tarrant County bench than the proportion of black voters in the Tarrant County's population.

Finally, the undisputed evidence showed that black candidates won as great a share of white votes as white candidates, if we control for party affiliation. For instance, Sturns, a black Republican with a long history of involvement in civil rights and black community organizations, won 57% of the white vote to beat a white Democrat. Wayne Salvant, another black Republican, also won a majority of the white vote, although he lost his race for a district court judgeship to a white Democrat supported by a combination of black voters, Hispanic voters, and white Democrats. Black Republicans also won the same share (50%) of their elections as white Republicans.

A prima facie case of vote dilution requires proof that

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[4]We note that there were four other viable Democratic candidates in the 1988 primary, so that Jackson could expect to receive only 20% of the white vote if that vote were randomly distributed.

[5]Taebel's exhibits also include a 1982 County Court primary in which the black-preferred candidate, Hicks apparently won by seven votes. However, this tabulation is apparently based on election returns prior to a recount under which Hicks apparently lost.

the white bloc majority is "*usually* ... able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Gingles*, [478 U.S. at 49] 106 S.Ct. at 2766 (emphasis in original). The plaintiffs failed to prove that the minority-preferred candidate was usually defeated in Tarrant County and therefore, failed to prove a prima facie case of vote dilution.

The district court, by contrast, found that the black-preferred candidate was consistently defeated in Tarrant County. The district court reached this conclusion by ignoring elections in which Hispanics had participated. This rejection of white-Hispanic elections was erroneous. The undisputed facts as reflected by Taebel's exhibits are that a majority of Hispanic voters always supported the candidate favored by black voters in every general election. The district court found that Hispanic and black voters were cohesive in Midland, Lubbock, and Ector counties on similar evidence. With virtually identical proof in Tarrant County the same conclusion must follow, and we hold that it does.

Given that black and Hispanic voters cohesively shared political interests, Hispanic candidates were capable of representing these shared interests. Hispanic candidates, in short, represented "viable minority candidates" within the meaning of *Gretna*. It follows that white-Hispanic elections were relevant in determining the success of black-preferred candidates. Considering such elections, it is clear that the black-preferred candidates were not consistently defeated. Considering white-Hispanic races, the black-preferred candidate won four out of nine elections—44.4% of the time. Excluding the three state-wide exogenous elections for Supreme Court and Attorney General, the black-preferred candidate won three out of six elections—or 50% of the time. Exogenous elections are generally less probative of the local communities' political culture and are therefore less probative of polarized voting than non-exogenous elections. 834 F.2d at 502. This is not the "consistent defeat" required by *Gingles*.

Moreover, blacks were not underrepresented on the

Tarrant County bench. Plaintiffs' own exhibit indicates that, for four of the five years studied, three of Tarrant County's district court judges were black; for these four years, while blacks made up only 11.8% of the population of Tarrant County, more than 13% of the Tarrant County bench was black. Given this persistent and substantial black presence on the Tarrant County bench, the consistent and substantial success of the minority-preferred candidate, and the absence of any evidence of racial politics in Tarrant County, we find that, even if the plaintiffs had proven the three *Gingles* factors, the district court clearly erred in finding illegal vote dilution under the totality of the circumstances. There is no case as a matter of law in Tarrant County.

D. *Travis County*

There are 13 district judges elected in Travis County. From 1985 to 1988, there was one Hispanic district judge, or 7.7% of the total number. This judge was defeated in 1988. The undisputed expert testimony and surveys of defendants showed that Hispanic lawyers made up at most 3.9% of the lawyers in Travis County. There are 312,392 voting age residents in Travis County. 44,847 have Spanish surnames. Only 29,067 are black. Plaintiffs proceed on behalf of Hispanic voters in Travis County.

Plaintiffs' witnesses stated that the Republican Party is insignificant in Travis County and the proper testing ground for candidates is the Democratic primary. Plaintiffs analyzed three Democratic primary elections for district court positions. Defendants analyzed four exogenous general elections, one for state senator, two for Supreme Court justice, and one for Attorney General; four exogenous primary elections, one for state senator, one for Supreme Court justice, and two for appellate court justice; and the three indigenous elections analyzed by plaintiffs.

By Taebel's analysis, the Hispanic-preferred candidate won all four exogenous general elections. In three of the four, the Hispanic-preferred candidate won a majority of the Anglo vote. The Hispanic-preferred candidate also won two exogenous primaries, for Supreme Court and state senator,

out of the seven primaries. The Hispanic-preferred candidate, therefore, won 54.55% of both the primaries and general elections studied, giving the exogenous primary and general election races for intermediate appellate courts and the Supreme Court the same weight given to the three entirely indigenous primary elections studied by plaintiffs.

The district court however, found that the three indigenous primary elections for district court positions were "closer in nature to District Court elections" and were sufficient to show a pattern of racial bloc voting sufficient to defeat the Hispanic-preferred candidate. The district court therefore relied solely on the three elections analyzed by both Taebel and Brischetto to find that the Hispanic-preferred candidate lost 100% of the time.

In each of the three district or county court primary elections analyzed by the plaintiffs, the Hispanic and Hispanic-preferred candidate was defeated by a white majority. In one of these races, however, white voters gave their support to a black candidate and thereby defeated both a Hispanic and a white candidate. The black candidate, Brenda Kennedy, had the overwhelming support of black as well as white voters, so it is difficult to conclude that Celia Castro and Robert Hughes, the Hispanic and white candidates respectively, were defeated by a white bloc. They were defeated by a black-white coalition. Castro's defeat is not evidence of the white majority's ability "usually to defeat the minority's preferred candidate." *Gingles*, [478 U.S. at 51], 106 S.Ct. at 2766-67.

The two remaining primary elections are too meager a proof to support a finding of liability, even if we disregard Texas' linkage interest. It was clear error for the district court to find otherwise. Plaintiffs' proof reduces to three facts: (1) two Hispanic and Hispanic-preferred candidates lost in 1988 in their Democratic primary races for district and county court judgeships; (2) only one Hispanic has served on the district court bench between 1985 and 1988, while no Hispanic served in 1989; and (3) Hispanics had suffered from past discrimination in Travis County.

In finding clear error, we repeat Justice Brennan's admonition that "the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election." *Gingles*, [478 U.S. at 51], 106 S.Ct. at 2767. It defies common sense to believe that the loss of two races in one year constitutes usual and predictable defeat by a white bloc, rather than simply "loss of an occasional election." However, assuming *arguendo* that these two elections constituted sufficient proof of the third *Gingles* factor, they are too meager to show dilution under the totality of the circumstances, as a matter of law. The plaintiffs contend that Hispanics are underrepresented on the Travis County bench. Hispanics make up 7.7% of the Travis County bench in four out of five years, while they make up, at most, 3.9% of the Travis County bar. Given such a small pool of eligible candidates, it is not surprising that Hispanics make up such a small proportion of the Travis County bench. One need not assume racial bias among voters to explain such a result.

The cause of the low number of Hispanic district judges in Travis County need not be attributed to the interaction of racial bias with the at- large system. Rather, it is equally likely such low numbers were the result of a dearth of eligible Hispanic candidates. The plaintiffs can point to only one race in which a Hispanic candidate lost an election for district court— Gallardo's 1988 defeat by Scott McCown. However, even if Gallardo had won this race, the Hispanic share of Travis County's bench would be only 2 out of 13— 15.4%, or 2% less than the number of Hispanics in the population. Gallardo's victory, of course, would not affect Hispanic representation in 1985, 1986, and 1987. It is pure speculation to attribute the low number of Hispanic judges to racial discrimination, given the low number of eligible candidates. To find dilution on the basis of these low numbers is clear error.

Far from signaling a submerging of minority voting strength by an intervention of elective processes and bias, the undisputed facts indicate that Travis County's political

system is open to Hispanic and white candidates alike. Hispanics won half of the four exogenous primary elections for Supreme Court, Court of Appeals, and State Senator produced by the defendants. The Hispanic- preferred candidate also won all four of the general elections produced by the defendants. The City of Austin contains most of Travis County's population. As this court noted in *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir.1989),

> Austin has repeatedly elected black and Mexican-American council members during the past 17 years.... [T]he winning minority candidates frequently received well over fifty percent (50%) of the Anglo vote and were also the preferred candidates of the minorities. Minority candidates have routinely been elected to other posts in Austin and the surrounding Travis County.

The defendants produced uncontradicted evidence that Hispanic County Commissioners had been elected from predominantly Anglo districts and won Anglo precincts and that John Trevino, a Hispanic City Council member, had been elected in city-wide elections to the Austin City Council. Against this background of minority success, plaintiffs' minimal case, based on two defeats of the Hispanic-preferred candidate by a white majority, is plainly insufficient to prove illegal vote dilution.

There was no evidence that racial politics defeated the two Hispanic-preferred candidates, Juan Gallardo and Alberto Garcia. The district court found no *Zimmer* factors indicating that race played any part in any election, such as racial appeals or unresponsiveness of elected officials to minority constituents. The only *Zimmer* factors found by the district court concerned the absence of single-shot voting and majority runoff requirement. Their only relevance is a tendency to enhance the effect of racial politics, not to prove racial politics' existence.

E. *Bexar County*

672,220 voting age residents reside in Bexar County. Of these, 46,767 (7.0%) are black, and 278,577 (41.4%) are Hispanic. Nineteen district judges are elected from Bexar

County. Of this number, five (26.3%) were Hispanic. Defendants' undisputed evidence shows that 11.7% of the lawyers in Bexar County were Hispanic. Plaintiffs proceed on behalf of Hispanic voters in Bexar County.

Plaintiffs and defendants analyzed six district court general elections with Hispanic candidates. Defendants also analyzed two appellate court and three county court elections with either Hispanic or black candidates. As in every other county, Hispanics voted cohesively for the Democratic candidate while Anglos supported the Republican candidate.

In the twelve studied elections, the Hispanic-preferred Democratic candidate won four times, 33.3%. The Republican candidate usually won the general election, and always won the Anglo vote, regardless of the candidate. There were four exceptions to this pattern: (1) the 1980 appellate court race between Murry and Esquivel; (2) the 1980 district court race between Prado and Priest; (3) the 1988 district court race between Bowles and Mireles; and (4) the 1988 county court race between Patterson and Canales. In these races, Priest, an Anglo Democrat, beat Prado, a Hispanic Republican, while Esquivel, Mireles, and Canales, Hispanic Democrats, beat their Anglo Republican opponents.

We find, however, that partisan affiliation does not completely explain the voting patterns in the Democratic primary elections. By defendants' own evidence of Democratic primaries in Bexar County, the Hispanic-preferred candidate lost in nine of fourteen elections, prevailing only 35.7% of the time, when Anglo voters voted for the Hispanic candidate's Anglo opponent. White support for the Hispanic candidate was seldom above 30% and as low as 1%—whereas the Hispanic vote for the Hispanic-preferred, and always Hispanic, candidate was above 70% for all but four of the unsuccessful candidates.

Although the evidence may create a fact-issue as to whether there was dilution, there is no fact-issue as to whether the proof of dilution was tenuous. As in Harris

County, the undisputed facts indicated Anglo voters would invariably support minority candidates of their preferred party and that minority-preferred candidates could prevail even when a majority of Anglo voters opposed them. Given these facts and a complete absence of substantial evidence of racial politics, any proof of dilution was meager at best and therefore could not overcome Texas' linkage interest as a matter of law.

The undisputed facts indicate that partisan affiliation accounts for much of the voting patterns analyzed by the parties. Most white voters are Republicans, most Hispanic voters are Democrats; the Republican candidate generally wins because the Republican party has more supporters. As in Harris County, white voters give a majority of their votes to Republicans and Hispanic voters give a majority of their votes to Democrats even when Hispanic Republicans are opposed by white Democrats. Prado and Barrera, Hispanic Republicans, won 70% and 84% of the estimated white vote respectively when running against white Democratic opponents, who received the overwhelming majority of the Hispanic vote.

Because Hispanic voters make up 41% of the population, they can elect Democratic candidates with minimal white support and do so repeatedly. The minority-preferred candidate won four out of twelve elections in which a Hispanic candidate participated—33% of the time—with as little as 17% of the white vote. As in Harris County, Hispanic voters were plainly a potent political force that could elect candidates by forming coalitions with small percentages of white voters. If Bexar County were sub-districted, Hispanic voters might elect a few more of their preferred candidates, but only at the price of losing their influence over the majority of Bexar County judges. The perversity of such a result is self-evident.

Finally, the evidence that elections were affected by racial politics preventing the formation of such coalitions is thin. As in Harris County, it consisted solely of (1) the general history of past discrimination; (2) the usual

enhancing factors present in every Texas county—anti-single shot voting and majority runoff requirement; and (3) the fact that Hispanic judges occupied only five out of nineteen district judgeships—26% of the total—when Hispanics made up 41% of Bexar County's population. Again, we note that Hispanic attorneys made up only 11% of the bar, so that the representation of attorneys on the bench is actually higher than would be produced by random choice from the pool of eligible candidates. This evidence, even if probative of racial vote dilution, is as meager as the evidence in Harris County.

The lingering effects of past discrimination, including evidence of low Hispanic voting registration, would exacerbate any racial politics in Bexar County. However, as we noted regarding Harris County, such evidence is, at best, weak circumstantial evidence that the minority-preferred candidate was defeated on account of race-conscious politics. Noting the effects of past discrimination, therefore, does little to strengthen plaintiffs' proof in the area where it is weakest.

The undisputed facts compel the conclusion that whatever dilution could have been found by the district court was marginal at best and cannot as a matter of law outweigh Texas' substantial state interest. If Texas' linkage interest does not outweigh this proof of dilution, then the interest would be a nullity. We hold that plaintiffs' proof fails in Bexar County as a matter of law.

F. *Jefferson County*

There are 8 district judges elected in Jefferson County. No black Judge has been elected there between 1985 and 1989. Defendants' evidence showed that 3.1% of the attorneys in Jefferson County are black. Depending on the survey examined, the evidence showed that between 14 and 17 black lawyers reside in Jefferson County. The Jefferson County district court judges have filed an amicus brief requesting judicial notice that John Paul Davis, a black, was elected to the county court in 1990. The amicus brief also notes that Morris Overstreet, a black Democrat, and Dan Morales, a Hispanic Democrat, won a majority of votes in

Jefferson County for state appellate court judge and Attorney General respectively in 1990. 179,708 people reside in Jefferson County who are of voting age. Of this number, 44,283 (24.6%) are black. Plaintiffs proceed on behalf of black voters in Jefferson County.

Brischetto analyzed eight primary and run-off elections including the 1988 Democratic Presidential Primary. Taebel analyzed four primaries and two general elections involving either blacks or Hispanics, all exogenous elections. Unlike their other studies, Brischetto and Taebel analyze totally different elections.

In all but one of the elections analyzed by Brischetto, the black vote was cohesive. In one case, the black-preferred candidate won a high plurality (47%) of the black vote. A majority of white voters always opposed the minority-preferred candidate in the primary elections.

Whether the black-preferred candidate was consistently defeated by the white bloc is a close question. The answer varies with the elections counted and how they are counted. Defendants point to two exogenous primaries (one for Supreme Court, and one for state appellate court) and two primaries for state representative in which black or Hispanics participated. In three of these, the black-preferred candidate prevailed. Defendants also rely on two exogenous general elections, for Supreme Court and Attorney General, in which Hispanic candidates participated in which both of the black-preferred candidates prevailed. Plaintiffs offer six indigenous primaries, four for justice of the peace,[6] one for county court, and one for U.S.

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[6]The black-preferred candidate prevailed in only six out of the fourteen elections, or 42.86% of the time, counting Freeman's failure to win the highest plurality in the 1972 and 1974 Democratic primaries for justice of the peace as "defeats" separate from Freeman's defeat in the run-off elections. However, Freeman won the second highest number of votes and was therefore able to compete in the subsequent run-off elections. We do not consider Freeman's primary elections to be separate from the run-off elections.

President, in which black candidates participated. The black-preferred candidate prevailed only once, when Jesse Jackson won a plurality in the Democratic Presidential primary of 1988.

Unlike Tarrant County, defendants' exhibits do not include estimates of how Hispanic residents in Jefferson County voted. We cannot find from the undisputed facts that Hispanic and black voters were politically cohesive in Jefferson County. It is possible, therefore, that white-Hispanic elections are entitled to less weight in a determination of the minority-preferred candidate's success than black-white races.

However, even if we confine our consideration to the elections analyzed by the parties in which black candidates participated, we find that the plaintiffs' evidence is inadequate to prove that black voters were denied an equal opportunity to participate in the political process so as to overcome the state's linkage interest. The plaintiffs and defendants together produced evidence of eight primary elections in which black and black-preferred candidates had participated. The black-preferred candidate won 3 primaries out of these eight elections—a victory rate of about 38%. All three of the black- preferred candidates' victories were exogenous: Jesse Jackson won the 1988 Democratic Presidential primary in Jefferson County, while Price won two Democratic primaries for state representative.

As in every other county but Dallas, the district court found no sign of racial appeals or non-responsiveness on the part of elected officials to the concerns of black constituents. The statistics indicated that the white vote did not monolithically throw its power against the black-preferred candidate. Price won the Democratic nomination for state representative with over 40% of the white vote in his two primary races. The minority-preferred candidate also prevailed in every general election submitted by the parties.

The plaintiffs' case was further weakened by their use of extremely dated statistics: three of their five elections came from elections held in 1972, 1974, and 1978. This is hardly

a practical and searching appraisal of contemporary conditions in Jefferson County. *See Nipper v. Chiles*, 795 F.Supp. 1525, 1540 (M.D.Fla.1992) (noting limited probative force of "stale" elections).

G. Midland County

There are three district judges in Midland County; none are Hispanic or black. Defendants' undisputed survey evidence shows that 10 black or Hispanic lawyers reside in Midland County. The County contains 82,636 voting age residents, 6,893 (11.9%) of whom have Spanish surnames and 4,484 (7.8%) of whom are black. Plaintiffs proceed on behalf of both Hispanic and black voters in Midland County.

Plaintiffs analyze three general elections in Midland County, two of which are the exogenous Gonzalez races for Supreme Court and one of which is an indigenous race by a black candidate for a Justice of the Peace position in 1986. Defendants also analyze Gonzalez's two bids for the Supreme Court in 1986 and 1988, as well as two Democratic and two Republican primaries in which either a black or Hispanic candidate participated. Defendants also analyze the Mattox-Barrera race for Texas Attorney General.

The analysis of both parties shows that the majority of whites always opposed the candidate preferred by the geographically compact and cohesive combined minority population in the general elections. The minority-preferred candidate was always defeated by this white majority.

We find that the district court clearly erred in finding dilution. The undisputed facts indicate that partisan affiliation, not race, caused the defeat of the minority-preferred candidate. The majority of minority voters always cast their votes in favor of the Democratic candidate. The white voters cast the majority of their votes for the Republican, regardless of the race of the Republican candidate. Indeed, Barrera, the Hispanic Republican candidate for Attorney General, won 76% of the white vote when running against Mattox, a white Democrat—the second highest vote received by any of the four Republicans who ran in the analyzed general elections. Because

Republican voters outnumbered Democratic voters, the minority-preferred Democratic candidate consistently lost. The plaintiffs have not met the third requirement of *Gingles*.

Even if plaintiffs could meet the *Gingles* threshold, the totality of circumstances does not add up to dilution. The plaintiffs can show only a general history of discrimination and a lack of minority judges. The latter fact proves little: in Midland County, only one minority lawyer has ever run for local office, according to the plaintiffs' exhibits, and none has ever run for a district court position. These low numbers are a reflection of low numbers of eligible candidates. According to the defendants' undisputed surveys, there were only ten minority lawyers residing in Midland County in 1989. As we have noted above, a general history of discrimination, without more, cannot show dilution.

Because the undisputed facts show that partisan affiliation uninfected by racial politics caused the minority-preferred candidates' defeat, we hold that the district court erred in finding dilution.

H. *Lubbock Counties*

There are five district judges elected from Lubbock County. None are black or Hispanic. The surveys introduced by the defendants indicate that 22 or 23 black or Hispanic lawyers reside in Lubbock County. The total voting age population is 150,714 people. Of this number, 22,934 (15.2%) have Spanish surnames, and 9,5090 (6.4%) are black, yielding a combined minority percentage of 21.6%. Plaintiffs proceed on behalf of the combined Hispanic and black voters in Lubbock County.

None of the parties analyze indigenous elections in Lubbock County; no minority has ever run for a position on the district court. Plaintiffs analyze two exogenous primaries and two exogenous general elections, for the Supreme Court and for the court of criminal appeals. Defendants analyze the same two general elections, adding a further exogenous general election for Attorney General of Texas.

Plaintiffs' and defendants' evidence showed that blacks

and Hispanics tend to vote cohesively. There is also no dispute that the majority of white voters vote against the candidate favored by the minority voters in Lubbock County in all the elections studied.

As in Midland County, however, the undisputed facts show that, in general elections, partisan affiliation and not racial politics caused the consistent defeat of the minority-preferred candidate. The data indicated that, in both counties, 60%-65% of the white voters supported the Republican candidate, while the majority of minority voters supported the Democratic candidate. As a result of this voting pattern, the minority-preferred, and always Democratic, candidate consistently lost to his Republican opponent, regardless of the ethnicity of the candidates.

In the 1986 and 1988 races for the Texas Supreme Court, Gonzales, Hispanic Democrat, lost Lubbock County's vote to Bates and Howell, white Republican opponents. However, in his race for the position of Texas Attorney General, Mattox, a white Democrat, lost to Barrera, a Hispanic Republican. Like Howell and Bates, Barrera took a majority of the white votes, while his white opponent, Mattox, took a majority of the minority votes. In short, the defendants established as a matter of law that voting patterns in these two counties were unaffected by the race of the candidates but rather were the result of partisan loyalty. Therefore, plaintiffs have not met the third *Gingles* factor.

Additionally, the totality of circumstances cannot support dilution. As in Midland County, the countervailing evidence of racial politics was too slender to create a fact issue. Although there were no minority judges on the Lubbock County bench, no minority candidate ever ran for such a position. The dearth of minority candidates, in turn, is not probative of race-conscious politics in light of the defendants' undisputed estimate that only 23 minority lawyers reside in Lubbock County.

The plaintiff also relied on two exogenous Democratic primary elections for state appellate and Supreme Court

positions.[7] However, the minority- preferred candidate won a majority of the votes cast in one of the two elections included in the plaintiffs' exhibits. Balancing Martinez's defeat, Gonzales won a majority of the votes cast in the Lubbock County Democratic primary for state Supreme Court. These primary races, therefore, do not indicate that the minority-preferred candidate was consistently defeated within the meaning of *Gingles*, and they cannot establish dilution.

I. *Ector County*

There are four district judges in Ector County. All are Anglo. Defendants' surveys estimated that six black and Hispanic attorneys reside in Ector County. Ector County has 79,516 voting age residents. 14,147 (17.8%) are Hispanic, while 3,255 (4.1%) are black. Plaintiffs proceed on behalf of the combined minority population in Ector County.

The parties rely on the same exogenous races in Ector County that they produced in Lubbock. The plaintiffs rely on two primary and two general elections of Gonzalez and Martinez for Supreme and appellate court respectively. The defendants add the Mattox-Barrera race for Attorney General.

The undisputed facts indicate that the minority-preferred, Democratic candidates were consistently defeated in general elections by a white majority voting for their Republican opponents. The undisputed facts also indicate that the minority-preferred candidate won half of the Democratic primary races and therefore was not consistently defeated in the primaries: Martinez won a majority of the votes cast in the Democratic primary.

As in Lubbock County on virtually identical facts, we

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[7]We hold that the runoff election subsequent to a primary election is a single election for the purposes of computing the success or failure of the minority-preferred candidate. The victor of the runoff election is the victor of the combined primary/runoff race.

find that the district court clearly erred in finding racial vote dilution. The undisputed facts indicate that partisan affiliation controlled the outcomes of the general elections: as in Lubbock County, while Hispanic Democratic candidates lost the white vote, Barrera, a Hispanic Republican, won a majority of the white vote running against Mattox, his white Democratic opponent.

While partisan affiliation would not explain polarization in the Ector County Democratic primaries, the undisputed facts indicate that the minority-preferred candidate was not consistently defeated by racial polarization in the primary elections, but rather won half of the two races analyzed. Plaintiffs have failed to meet the third threshold requirement of *Gingles*.

IV. *Conclusion*

We find that the district court erred by holding that the at-large method of electing judges violated § 2 in any of the nine counties. Defendants prevail by two routes. Either the evidence was insufficient to support a conclusion of vote dilution, or the proof of dilution was so meager as to be outweighed by the linkage interest as a matter of law.

There was no evidence that white voters refused to support black candidates. In all counties, white voters supported the minority candidate of their preferred party. There was no evidence that minority candidates could not be elected in any county. In all counties, minority candidates were elected with support from the white community. In the one alleged racial incident in a judicial race, the minority-preferred candidate, a black, won with 61% of the white vote. Any racial appeal was rejected.

In short, in the totality of the circumstances, plaintiffs produced no substantial evidence to override the state's substantial interest. Plaintiffs failed to prove a dysfunction traceable to race or color in the political climate of the contested counties. Absent such dysfunction, there is little indication that minority voters could not influence elections through the normal mechanisms of interest-group democracy

despite the defeats of the minority-preferred candidate. Ending the county-wide election of district judges would only reduce minority influence by denying minority voters any say in the election of a judge that by large odds will preside over any dispute of their own or their family. This perversity coupled with the problematic proof of any dilution on account of race leaves the weighing of totality of the circumstances so plain as to permit only one outcome.
REVERSED.

ORDER
Feb. 11, 1993.

Before POLITZ, Chief Judge, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, and DeMOSS, Circuit Judges.*

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have this case reheard en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed.

*Judge Emilio M. Garza is recused, and, therefore, did not participate in this decision.

**[Decision of the District Court
November 8, 1989]**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

Filed November 08, 1989
CIVIL ACTION NO. MO-88-CA-154

LEAGUE OF UNITED LATIN AMERICAN
CITIZENS (LULAC), COUNCIL #4434
et al.,
Plaintiffs,

AND
HOUSTON LAWYERS ASSOCIATION, et al.,
Plaintiff-Intervenors,

v.

JIM MATTOX, et al.,
State Defendants

AND
JUDGE SHAROLYN WOOD AND JUDGE F.
HAROLD ENTZ.

MEMORANDUM OPINION AND ORDER

The above-captioned cause came on for trial before the Court on September 18, 1989. This suit was brought by named individual Plaintiffs and members of the League of

United Latin American Citizens ("LULAC"), Council #4434, LULAC Council #4451 and LULAC Statewide. Plaintiffs are Mexican-American and Black citizens of the State of Texas. Plaintiffs seek (1) a Declaratory Judgment that the existing at large scheme of electing State District Judges in nine (9) target counties of the State of Texas violates Plaintiffs' civil rights by unconstitutionally diluting the voting strength of Mexican-American and Black electors in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 (West Supp. 1989) ("Voting Rights Act")[1]; (2) a permanent injunction prohibiting the calling, holding, supervising or certifying any future elections for District Judges under the present at large scheme in the target areas; (3) formation of a judicial districting scheme by which District Judges in the target areas are elected from

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[1] Section 2 provides in pertinent part:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color ...
>
> "(b) A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

(Emphasis in the original.)

districts which include single member districts; and (4) costs and attorneys' fees.

This case really had its beginning in 1965, when Congress passed the Voting Rights Act and it was signed by President Johnson. This Act, as everyone knows, had as its purpose "to rid the country of racial discriminating in voting."

The next chapter in the saga was the holding in *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied, sub nom, Chisom v. Edwards*, 109 S.Ct. 310 (1989) (*Chisom I*). In *Chisom I* Judge Johnson held: "Minorities may not be prevented from using Section 2 [of the Voting Rights Act] in their efforts to combat racial discrimination in the election of state judges; a contrary result would prohibit minorities from achieving an effective voice in choosing those individuals society elects to administer and interpret the law."

Having concluded, as will later be pointed out in formal Findings of Fact and Conclusions of Law, that there is racial discrimination in the election of state judges in some counties of the State of Texas, and the law plainly being that such discrimination is prohibited by the Voting Rights Act, this opinion should not come as any surprise to the attorneys or judges of this State.

Mr. Justice Holmes, in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221, in dissenting, said:

> I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.

This dissent has been on the books for 83 years and, while this Court recognizes that some judges may legislate, this Court is extremely reluctant to do so. Legislation should be done by legislators. This Court has determined that our current system, as it applies to some counties, violates Section 2 of the Voters Rights Act. Some fixing has to be done, because the current system is broken.

In writing this opinion, I am cognizant of the fact

that our Texas Constitution will need to be amended. Legislators should seriously consider nonpartisan elections for District Judges. As Chief Judge Tom Phillips pointed out in his testimony, it really makes no sense that judges are selected because of their political affiliation. A judge should decide matters before him without regard to partisan politics. It speaks well of our current judiciary that our sitting judges have been able to make decisions without regard to whether the judge is Republican or Democrat.

As long as judges, however, are selected on a partisan ballot, there will be some rancor and enmity between the successful and the unsuccessful candidate. The loser is going to have regrets by virtue of the fact that she or he did not secure enough votes in an election. It makes no sense to believe that a judge is selected because the top of the ticket is either weak or strong. This Court felt the animosity between certain judges in the courtroom. There is no need for this. Certainly judicial reform will not make all candidates live by the Golden Rule, but it is a step in the right direction. It was brought to the Court's attention that perhaps a majority of the voters in a General Election, and for that matter, in Primary Elections, have no idea of the qualification of a judge for whom they vote. Their vote is cast because a straight ticket is being cast, and a straight ticket includes judicial nominees from a particular political party.

If the Constitution is to be changed, would it not make sense to have judges elected when members of school boards or city councils are elected? These races are traditionally nonpartisan, and people going to the polls to vote for school trustees or mayors have for the most part some idea of the qualifications of the candidates. Judges could be selected at the same time in order to make sure that one was not getting votes simply because one is Democrat or Republican. Minority voters could go to the polls with their heads held high and with some realization that their preferred candidate either would be or could be elected.

Certainly, it is not Court's intention to tell the legislature how its job is to be accomplished. Single member districts may or may not be the answer if we are to continue to have partisan elections. There may be easier and better solutions that can evolve through the legislative process.

These are troubled waters. One hesitates to plunge into such waters, because our system of selecting judges has, for the most part, served us well for many many years. Our Congress, however, in 1964, made changes. Our Courts have construed those changes, and it is now necessary to move forward so that minorities can realize the rights legally bestowed upon them, and which have, in the past, been denied.

THE PRESENT AT-LARGE SYSTEM

This litigation challenges the system of electing 172 District Court Judges at-large from areas composed of entire counties.[2]

The present system of electing District Court Judges in Texas requires that each judge be elected from a District no smaller than a county. Tex. Const. Art. 5 § 7a(i) (Vernon Supp. 1989).[3] Each Judge serves a term of four (4) years. Tex. Const. Art. 5 § 7 (Vernon Supp. 1989). Candidates for District Judge must be citizens of the United States and the State of Texas, licensed to practice law in this State and a practicing lawyer or Judge of a Court in this State, or both combined for four years. *Id.* Candidates must have been a resident of that election district for at least two (2) years and reside in that district during his or her term of election. *Id.* District Court Judges must be nominated in a primary election by a majority of the votes cast. Tex. Election Code § 172.003 (Vernon 1986). Each

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[2] The counties at issue are: Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland.

[3] This system is "at-large" because judges are elected from the entire county rather than from geographic subdistricts within the county.

candidate's political party is indicated on the election ballot. Judicial candidates are usually listed far down on an election ballot. They run for specifically numbered courts and must secure a plurality of the vote in the general election to win a judicial seat.

METHODOLOGY, DATA AND ELECTIONS ANALYZED

Statistical analysis is the common methodology employed and accepted to prove the existence of political cohesiveness and racial bloc voting necessary to establish a voter dilution case.[4] Ecological regression analysis[5] and

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[4] In *Thornburg v. Gingles*, 479 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), Justice Brennan held that racial bloc voting can be established by a type of abstract statistical inquiry called "bivariate regression analysis." This analysis correlates the race of the voters and the level of support given to the candidate. *Id.* at 61. If a candidate is supported by a large proportion of the minority group yet does not win, the vote is declared to be racially polarized in a legally significant sense and racial bloc voting is taken to be established.

All variables beside race of the voters and support given the candidates that might also explain voters' choices are expressly excluded from consideration. In Justice Brennan's view, "[i]t is the difference between the choices made by [minorities] and whites - not the reasons for that difference - that results in [minorities] having less opportunity than whites to elect their preferred representatives." *Id.* at 63.

[5] Ecological regression analysis shows the relationship between the ethnic composition of voting precincts and voting behavior, i.e., which candidate receives how many votes from each race/ethnic group. This type of analysis incorporates the use of a coefficient of correlation or Pearson r, accompanied by an estimate of the statistical significance of r, the coefficient of determination and the regression line. *See Overton v. City of Austin*, 871 F.2d 529, 539 (5th Cir. 1989).

extreme case analysis[6] were the types of statistical analysis used by Plaintiffs' experts in the present case.[7]

The data used by Plaintiffs to support their statistical analysis varied according to the type of information available to them since the 1980 Census. Plaintiffs used voting age population data by census tract to establish the *Gingles* 1 factor of size and geographic compactness. Plaintiffs used

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[6] Extreme case or homogenous precinct, analysis looks to homogenous precincts in which almost all of the people of voting age belong to one ethnic group. If race/ethnicity reflects voting behavior, then election results in predominately minority precincts should differ from results in predominately Anglo precincts.

[7] The majority which agreed with Justice Brennan that voter dilution was demonstrated by the impact or results of the *Zimmer* factors and the *Gingles* threshold analysis deserted him when he came to the proof of the second and third *Gingles* factors.

Justice White maintained that under Justice Brennan's test there is racially polarized voting whenever a majority of whites vote differently from a majority of blacks, regardless of the race of the candidates. *Gingles*, *supra*, at 83. To illustrate his disagreement, Justice White posited the hypothetical which assumed an eight-member multimember district that was 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Justice White further assumed that there were six white and two black Democrats running against six white and two black Republicans. Justice White wrote, "[u]nder Justice Brennan's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominately black areas vote Democratic." *Id.* at 83. Justice White concluded that such analysis was "interest-group politics rather than a rule hedging against racial discrimination." *Id.* at 83.

Justice O'Connor and the three other Justices for whom she wrote did not reject bivariate regression analysis solely to establish political cohesiveness and assess the minority groups prospects for electoral success. *Id.* at 100. However, Justice O'Connor did reject Justice Brennan's position that evidence that explains divergent racial voting patterns is irrelevant.

a variety of data sets to establish the *Gingles* 2 cohesiveness and *Gingles* 3 white bloc voting factors depending on information available in the County in question.

In Counties where Plaintiffs presented a case on behalf of Hispanics only, they relied on the percentage of Hispanic registered voters in voting precincts in any given year. These figures were based on Spanish surname counts done by the Secretary of State of Texas. In other instances, Plaintiffs used counts of Black and Hispanic totals or voting age population in each precinct of a particular county. When counts were not available, Plaintiffs based their analysis on 1980 census information. In some counties, precincts retained the same boundaries reported in the 1980 census. 1980 census data from precincts with unchanged boundaries were used in those counties. In several counties, Plaintiffs reconfigured precinct lines[8] and used demographic data from these newly created precincts. When relying on census data, Plaintiffs calculated the number of non-minorities within precincts by subtracting the number of Hispanics and Blacks from the total number of persons within the precinct.

Plaintiffs' experts only reviewed elections where a minority candidate opposed an Anglo. They preferred to analyze general elections, however primary elections were analyzed when no minority candidate made it past that stage of the electoral process.

The Supreme Court in *Thornburg v. Gingles*, *supra*, requires the analysis of several elections to determine if there is a pattern of voting related to race/ethnicity. In the present case, when there were District Court elections in a county in question in which a minority opposed an Anglo, Plaintiffs relied solely on analysis of District Court elections. In some Counties this included both general and primary

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[8] This process requires comparing new precinct maps with their new lines and census block maps that show racial composition of the blocks. This process is frequently used to update precinct data.

elections. Where there were not enough such District Court elections other elections were analyzed. First, County Court elections in which minorities opposed Anglos were selected. Next, Plaintiffs turned to Justice of the Peace elections where the election district was at least as large as a city within the county at issue. Finally, if no relevant local judicial races occurred, Plaintiffs analyzed statewide judicial elections. *See* Testimony of Dr. Robert Brischetto.

All jurisdictional prerequisites necessary to the maintenance of the claims of the parties have been fulfilled. After reviewing the testimony and exhibits introduced at trial, as well as the arguments and authorities of counsel, the Court hereby enters the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52.

FINDINGS OF FACT

INDIVIDUAL PLAINTIFFS

1. The names and counties of residence of the ten (10) named individual Plaintiffs are as follows: (a) Christina Moreno - Midland; (b) Aquilla Watson - Midland; (c) Joan Ervin - Lubbock; (d) Matthew W. Plummer, Sr. - Harris; (e) Jim Conley - Bexar; (f) Volma Overton - Travis; (g) Gene Collins - Ector; (h) Al Price - Jefferson; (i) Mary Ellen Hicks - Tarrant; and (j) Rev. James Thomas - Galveston. Each named Plaintiff is a citizen of the United States registered and qualified to vote in District Court elections in Texas. Except for Christina Moreno, who is Hispanic, each named Plaintiff Black.

ORGANIZATIONAL PLAINTIFFS

2. Plaintiffs LULAC #4434 and LULAC #4451 are local chapters of the larger Statewide LULAC organization. Members of the LULAC Statewide organization reside in all of the counties challenged in this suit. Depo. of John Garcia. The organization is composed of both Mexican-American and Black residents of the State of Texas. The members of LULAC #4434 reside in Midland County. The members of LULAC #4451 reside in Ector County.

3. Plaintiff-Intervenor the Houston Lawyers Association ("HLA"), is an association of Black lawyers in Harris County. The participation of Plaintiff-Intervenor the Texas Black Legislative Caucus ("TBLC") is limited to the remedy stage of this litigation.

DEFENDANTS & DEFENDANT-INTERVENORS

4. Defendants are sued in their official capacities only. Defendant Jim Mattox is the Attorney General of the State of Texas and charged with the responsibility of enforcing the laws of the State.

Defendant George Bayoud is Secretary of State of Texas. As such he functions as chief elections officer charged with administering the election laws of the State. Secretary Bayoud is substituted as a party in this litigation for former Secretary of State Jack Rains.

Defendants Thomas R. Phillips, Michael J. McCormick, Ron Chapman, Thomas J. Stovall, James F. Clawson, Jr., Joe E. Kelly, Robert M. Blackmon, Sam M. Paxson, Weldon Kirk, Jeff Walker, Ray D. Anderson, Leonard Davis and Joe Spurlock, II are members of the Judicial Districts Board[9] created by Art. V. Section 7a of the Texas Constitution and Art. 24.911 *et seq.* of the Texas Government Code. The Judicial Districts Board is charged with reapportioning districts from which District Court Judges are elected.

Sitting District Court Judge Sharolyn Wood, 127th District Court, Harris County and Judge Harold Entz, Jr., 194th District Court, Dallas County Intervened in their

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[9] Several members of the Judicial Districts Board were replaced by new members during the interim of this litigation. Michael J. McCormick replaced John F. Onion, Robert M. Blackman replaced Joe B. Evans and Jeff Walker replaced Charles Murray.

individual capacities as Defendants.[10]

GINGLES THRESHOLD ANALYSIS

Size and Geographic Compactness

5. *Harris County.* Harris County has the largest population among the nine target Counties in this case. Plaintiffs are proceeding only on behalf of Black voters in Harris County. With a total population of 2,409,544,[11] its Black population is 473,698 (19.7%). There are 1,685,024 people of voting age,[12] with 305,986 (18.2%) voting age Black residents of Harris County. Plaintiffs' Harris County ("H") Exhibit 01.

There are fifty nine (59) State District Courts in Harris County. Black residents are concentrated in the North Central, Central and South Central sections of Harris County. H-04, p. 2, Map of Proposed Districts.[13] Evidence

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[10] Thirteen District Court Judges from Travis County initially intervened as Defendants. The Court struck their intervention at their request.

[11] In each County, Plaintiffs rely upon the 1980 Census for total population of Blacks and Hispanics within the County.

[12] For all Counties in this case, Plaintiffs relied on a computer print out of voting age populations prepared by the Data Center at Texas A&M University directly from 1980 U.S. Census tapes.

[13] Plaintiffs drew districts in each County of approximately equal size based on the number of District Courts in the County. Plaintiffs calculated the size and number of precincts in each proposed district on the basis of both total population and voting age populations. This Court recognizes that the concept of "one man one vote" does not apply to the judicial elections. *Chisom I, supra,* at 1061. Accordingly, this Court's analysis rests upon Plaintiffs' calculation based upon voting age population. Plaintiffs drew each district on this basis under the assumption that each district should contain 1/n of the voting age population in the County, with n being the number of District Courts in the County. Plaintiffs' Post Trial Brief at 11.

was introduced that nine (9) Black single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1; Plaintiff-Intervenor Harris County ("P-I H") Exhibits 2, 2a.

6. *Dallas County.* Dallas County is the second largest County involved in this case. Plaintiffs are proceeding only on behalf of Black voters in Dallas County. Dallas County has a total population of 1,556,549. Its Black population is 287,613 (18.5%). There are 1,106,757 people of voting age, with 180,294 (16%) voting age Black residents. Plaintiffs' Dallas County ("D") Exhibit 01.

There were thirty six (36) State District Courts in Dallas County at the time this case was filed. On September 1, 1989, the Texas Legislature created a thirty-seventh State Judicial District Court in Dallas County. Black residents are concentrated in the Central and South Central sections of Dallas County. D-04, p. 2, Map of Proposed Districts based on 36 District Courts. Evidence was introduced that seven (7) Black single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1, 3-9;[14] Plaintiff-Intervenor Dallas ("P-I D") Exhibits 34. Plaintiff-Intervenors' Exhibit 7 reflects that there are approximately 36 homogeneous precincts of 90% Black population.

7. *Tarrant County.* Plaintiffs are proceeding only on behalf of Black voters in Tarrant County. Tarrant County has a total population of 860,880. The Black population of Tarrant County is 101,183 (11.8%). There are 613,698 people of voting age, with 63,851 (10.4%) voting age Black residents of Tarrant County. Plaintiffs' Tarrant County ("Ta") Exhibit 01.

There are twenty three (23) State District

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[14] Proposed single member districts 1 & 3 barely meet the *Overton* majority -minority voting age population requirement. These proposed districts contain 51.33% and 52.05% black voting age population respectively.

Courts in Tarrant County. Black residents are concentrated in the Center of the County. Ta-04, p. 2, Map of Proposed Districts. Evidence was introduced that two (2) Black single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1.

8. *Bexar County*. Plaintiffs are proceeding only on behalf of Hispanic voters in Bexar County. Bexar County has a total population of 988,800. Its Hispanic population is 460,911 (46.61%). There are 672,220 people of voting age with 278,577 (41.1%) voting age Hispanic residents of Bexar County. Plaintiffs' Bexar County ("B") Exhibit 01.

There are nineteen (19) State District Courts in Bexar County. Hispanic residents are concentrated in the Central and South Central sections of the County comprising most of the population of the City of San Antonio. B-04, p. 2, Map of Proposed Districts. Evidence was introduced that eight (8) Hispanic single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1.

9. *Travis County*. Plaintiffs are proceeding only on behalf of Hispanic voters in Travis County. With a total population of 419,335, its Hispanic population is 72,271 (17.2%). There are 312,392 people of voting age with 44,847 (14.4%) voting age Hispanic residents of Travis County. Plaintiffs' Travis County ("Tr") Exhibit 01.

There are thirteen (13) State District Courts in Travis County. The largest concentration of Hispanic residents in one area, if at all, appears to be located in the Eastern portion of the County. Tr-04, p. 2; Tr-05, p. 1, Map of Proposed Districts. Mr. David Richards testified that in his opinion the Hispanic community was pretty well dispersed in Travis County. Nevertheless, evidence was introduced that one (1) combined minority single member district of greater than fifty percent (50%) Hispanic voting age population was possible. *Id.* at 1. Plaintiffs' Exhibit Tr-04 depicts the single member Hispanic district proposed for Travis County. The Court finds that it is without moment that the proposed district appears to be minimally

contiguous.

10. *Jefferson County.* Plaintiffs are proceeding only on behalf of Black voters in Jefferson County. Jefferson County has a total population of 250,938. Its Black population is 70,810 (28.2%). There are 179,708 people of voting age of which there are 44,283 (24.6%) voting age Black residents of Jefferson County. Plaintiffs' Jefferson County ("J") Exhibit 01.

There are eight (8) State District Courts in Jefferson County. Black residents are concentrated in the Central and South Eastern portions of Jefferson County. J-04, p. 2, Map of Proposed Districts. Evidence was introduced that two (2) Black single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1.

11. *Lubbock County.* Plaintiffs are proceeding on behalf of the combined Black and Hispanic voters in Lubbock County. There is a total population of 211,651 in Lubbock County. The Black population of Lubbock County is 15,780 (7.5%), while the Hispanic population is 41,428 (19.6%). There are 150,714 people of voting age, with 9,590 (6.4%) voting age Black residents and 22,934 (15.2%) voting age Hispanic residents. The combined minority voting age population is 32,524 (21.6%). Plaintiffs' Lubbock County ("L") Exhibit 01.

There are six (6) State District Courts in the Lubbock Crosby County area. The combined minority population is concentrated in the North Eastern, Eastern and South Eastern sections of those Counties. L-04, p. 2, Map of Proposed Districts. Evidence was introduced that one (1) combined minority single member district of greater than fifty percent (50%) Black voting age population was possible. *Id.* at 1. This remains true when Plaintiffs controlled for voting age population of non-United States citizens of Spanish origin. Plaintiffs' Exhibit L-11.

12. *Ector County.* Plaintiffs are proceeding on behalf of combined Black and Hispanic voters in Ector County. The total population of Ector County is 115,374.

Its Black population is 5,154 (4.5%) and the Hispanic population is 24,831 (21.5%). There are 79,516 people of voting age. The voting age population by minorities consists of 3,255 (4.1%) Black voters and 14,147 (17.8%) Hispanic voters for a combined minority voting age population of 17,402 (21.9%). Plaintiffs' Ector County ("E") Exhibit 01.

There are four (4) State District Courts in Ector County. Minority residents are concentrated in the Southwest section of the County. E-04, p. 2, Map of Proposed Districts. Evidence was introduced that one (1) combined minority single member district of greater than fifty percent (50%) minority voting age population was possible. *Id.* at 1. It is possible to draw a district of combined minority population of voting age even if non-citizen voting age Hispanics are eliminated from the calculations. Plaintiffs' Exhibit E-13.

13. *Midland County.* Plaintiffs proceed on behalf of Black and Hispanic voters combined in Midland County. Midland County has a total population of 82,636. Its Black population is 7,119 (8.6%) and its Hispanic population is 12,323 (14.9%). There are 57,789 people of voting age, 4,484 (7.8%) voting age Black voters and 6,893 (11.9%) voting age Hispanic voters. The combined voting age population is 11,377 (19.7%). Plaintiffs' Midland County ("M") Exhibit 01.

There are three (3) State District Court in Midland County. Black residents are concentrated largely in the Northeastern, East Central and Southeastern sections of Midland County. M-04, p. 2, Map of Proposed Districts. Evidence was introduced that one (1) combined minority single member district of greater than fifty percent (50%) combined voting age population was possible. *Id.* at 1. It is possible to draw a district in which the combined minority population is in the majority even if non-citizen Hispanics of voting age are excluded. Plaintiffs' Exhibit M-15.

Political Cohesion and White Bloc Voting

14. Racially polarized voting indicates that the

group prefers candidates of a particular race.[15] *Monroe v. City of Woodville*, No. 88-4433, slip op. at 5573, (5th Cir. Aug. 30, 1989). Political cohesion, on the other hand, implies that the group generally unites behind a single political "platform" of common goals and common means by which to achieve them. *Id.* at 5573.

The inquiry into political cohesiveness is not to be made prior to and apart from a study of polarized voting. The Supreme Court made clear that "[t]he purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 56.

15. Plaintiffs presented testimony of two experts. Dr. Richard Engstrom ("Dr. Engstrom") testified only about Harris and Dallas Counties. Dr. Robert Brischetto ("Dr. Brischetto") testified concerning all other counties at issue in this case.

16. *Harris County*

a. Dr. Richard Engstrom testified on behalf of Plaintiffs and Plaintiff-Intervenors in Harris County. Dr. Engstrom used 1980 U.S. Census counts of total Black population by precinct to analyze 1980 election results. For 1982, 1984, 1986 and 1988, Dr. Engstrom used precinct voter registration estimates supplied by Dr. Richard Murray, a non-testifying expert. Plaintiffs' Exhibit P-I H-08. Dr. Engstrom verified or "matched" the reliability of Dr. Murray's estimates and the 1980 Census counts by comparing Dr. Murray's estimates to an Hispanic precinct voter registration list compiled by the Secretary of State.

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[15] The Supreme Court in *Gingles* adopted the definition of racial polarization offered by Dr. Bernard Grofman, appellees' expert. Dr. Grofman explained that racial polarization "'exists where there is a consistent relationship between [the] race of the voter and the way in which the voter votes' ... or to put it differently, where 'black voters and white voters vote differently.'" *Gingles*, 478 U.S. at 53 n.21.

Testimony of Dr. Richard Engstrom. Dr. Engstrom testified that there was "a very good match."

b. Dr. Engstrom analyzed 17 general elections in Harris County. He calculated "r" values[16] between 0.798 and 0.880 for the 17 elections analyzed.[17] Plaintiffs' Exhibit P-I H-01 pp. 1-2. Dr. Engstrom's regression analysis shows a strong relationship between race and voting patterns in Harris County. *See* Appendix A to this opinion ("Appendix"), Plaintiffs' Exhibit P-I H-01 pp. 1-2. All of his correlation coefficients[18] exceed .79 (79%) except one. *Id.*, *see* section on Bivariate Regression under the column heading of Correlation Coefficient. Dr. Robert Brischetto generally testified with regard to the counties in issue other than Dallas and Harris County, that a Pearson r of 1 (100%) would show perfect correlation. He further testified that social scientists consider anything over 0.50 (50%) as showing a strong correlation.

c. Further, each Pearson r is accompanied by an

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[16] The "r" value describes the relationship between the racial composition of a precinct and the number of votes a particular candidate receives. Testimony of Dr. Engstrom. To put it another way, "how consistently a vote for Black candidate changes as the racial composition of the precinct changes." *Id.*

[17] "Crucial to the validity of regression analysis are the values for 'r' and 'r[squared]', which measure the strength of the correlation and linear relationship of the variables being examined, in this case the race of the voter and the candidate he supports." *Overton*, 871 F.2d at 539

[18] The "r" value is also referred to as the "correlation coefficient" or "Pearson r." A positive Pearson r shows that as the percentage of minorities in a precinct increases, so does the support that a minority candidate receives. A Pearson r of -1 shows the opposite, as the percentage of minorities in a precinct increases, there is decrease in the support that a minority candidate receives. A Pearson r of 0 shows that there is no relationship between the racial/ethnic composition of precincts and voting behavior.

estimate of the likelihood that the estimate would occur by chance. This figure is known as the significance level. In the regression analyses for Harris County, as well as all the counties in issue, the significance level was much smaller than the generally accepted level of extremely high significance of .05.[19] Testimony of Dr. Robert Brischetto; Testimony of Dr. Richard Engstrom. Dr. Engstrom testified that the probability that the Harris County estimates would have occurred by chance were less than 1 out of 10,000.

d. The lowest r squared for these analyses is approximately .62 (62%). This describes the percentage of the variance in voting behavior explained by race/ethnicity. Testimony of Dr. Robert Brischetto.[20] Squaring these "r" values[21] to calculate coefficients of determination demonstrates in the present case that race explains at least 62% of the variance in voting in all 17 elections relied on by Plaintiffs and Plaintiff-Intervenors.

e. The one judicial race that did not exceed the 79% figure actually had a negative correlation. This race involved Mamie Proctor, a Black candidate running on a Republican ticket against Henry Schuble, an Anglo, for State Family Court 245. In the 1986 Proctor race, the correlation coefficient was -0.836 (approx. -84%). *Id.* at 1; Plaintiffs' Exhibit P-I H-10 p. 2. This reflects that, as the percentage

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[19] A significance level of .01, for example, means that the Pearson r in question would have occurred by chance only one time out of one hundred.

[20] For example, if a Pearson r is .5, then 25% (5 x 5 or r squared) of the variance in voting behavior is explained by race/ethnicity.

[21] This figure is also known as the coefficient of determination. It is the coefficient of correlation or Pearson r multiplied by itself. It shows how much or little "noise" there is around the line of correlation or, in other words, "the percentage of variance in the vote that is explained by the race of the voters." *Overton*, 871 F.2d at 539 n.11.

of Blacks in voting precincts increases, Proctor's support decreased. In other words, even though Ms. Proctor is Black, she did not receive the support of the Black community. Hence, she was not the preferred candidate of Black voters in Harris County. Dr. Engstrom testified on cross examination that the "candidate of choice" was the candidate who received the majority of the black vote, not necessarily the Black candidate.

f. When Dr. Engstrom controlled for Hispanic votes, Dr. Engstrom's regression analysis shows that Blacks consistently gave more than 97% of their vote to their preferred candidate. *Id.*, *see* last two columns.

g. Dr. Engstrom's homogenous precinct analysis corroborates the results of his regression analysis. *See* Appendix A, Plaintiffs' Exhibit P-I H-01 pp. 1-2. It shows that Black voters in Harris County gave more than 96% of their votes to the preferred candidate of Black voters in every election except Proctor's. Ms. Proctor received 5% of the Black vote.

h. Finally, in all counties including Harris County, Plaintiffs "weighted" precinct data in order to account for variations in the population size of the various precincts. Testimony of Dr. Richard Engstrom; *Overton*, *supra*, at 537. Dr. Engstrom testified that on the basis of his analysis the Black community in Harris County votes cohesively in general elections for State District Court Judges.

i. Harris County Defendant-Intervenor Judge Sharolyn Wood ("Judge Wood"), attacks Plaintiffs and Plaintiff-Intervenor's proof on the following grounds: (1) Dr. Engstrom failed to establish the reliability of his data set; (2) absentee votes were not allocated to election returns; (3) the analysis does not reflect the effect of the influx of the Vietnamese population into Harris County and traditionally Black precincts; and (4) the analysis fails to reflect black candidate successes in primary elections or uncontested races.

j. In reference to the reliability of the data set,

Judge Wood points to numbers on Dr. Murray's printouts that have been written over, struck out or crossed through, pencil notations and other marks. This Court finds the data set to be reliable.

k. In response to the other concerns, Dr. Engstrom testified that: (1) primary elections were not examined in Harris County because those elections were not filtering out the candidate of choice of Black voters; (2) uncontested races do not assist researchers in their analysis; (3) the appropriate comparison in Voting Rights cases is Black and non-Black; (4) while he did not specifically control for Asian Americans, they would be included in the percentage of non-Black votes; and (5) the range of absentee votes between 1980 and 1986 never exceeded 3.2% to 7.6%, while in 1988 that range rose to approximately 13.6% per precinct. This Court finds that Dr. Engstrom's testimony adequately addresses these concerns. The Court further finds that the lack of control for absentee votes and Asian Americans does not significantly affect Dr. Engstrom's analysis.

l. The State Defendant and Defendant-Intervenors argue that it is a candidate's political party and the strength of straight ticket party voting that determines the result of any election contest and not the difference between the preferred candidates of whites and minorities. In support of this argument, Defendants and Defendant-Intervenors point to the 1982 and 1986 Democratic sweep for judicial candidates in Harris County and a similar Republican sweep in the years 1984 and 1988. All Defendants attribute this phenomenon to top of the ticket straight party voting.[22]

m. Correlation and regression can also prove the

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[22] In 1982, Senator Lloyd Bentsen was the lead Democratic candidate on the ballot. In 1986, Governor Mark White represented the top of the ticket Democratic candidate. In Presidential election years 1984 and 1988, President Ronald Reagan and President George Bush, respectively, were the top Republican candidates.

third *Gingles* prong by showing that a white bloc vote exists. This is shown when the percentage of votes received by the minority candidate decreases as the percentage of minority persons of voting age decreases. In other words, the minority candidate receives fewer votes as the percentage of non-minority persons in a precinct increases. Regression results estimate the percentage of non-minority support for minority candidates, otherwise known as the Anglo cross over vote. Plaintiffs' Exhibit P-I H-01 pp. 1-2. column 4. This is also referred to as the Y intercept.

n. Dr. Engstrom calculated Y intercepts for the Black preferred candidate between 29 and 39 percent for the 17 elections analyzed. The highest Y intercept was 53.6%, but this percentage of the non-Black vote was for the non-preferred candidate Mamie Proctor. The highest percentage of Anglo cross over votes received by the preferred candidate of Black voters was 39 percent. *See* 1986 race Carl Walker, Jr., Black Democrat against George Godwin; *Id.* This is corroborated by a 40% Anglo cross over vote figure calculated for the same race in homogenous precincts of 90% or more non-Black population. *Id.* at column 1. Mr. Walker was the Black preferred candidate and won. Plaintiffs' Exhibit P-I H10. Two other Black preferred candidates drawing opposition in the 1986 elections lost their elections even though they had identical Black community support. These two candidates had slightly less Anglo cross over vote. Plaintiffs' Exhibit P-I H-01 pp. 1-2, column 1. Five other Black preferred candidates drawing opposition in what appears to be county-wide elections lost in the 1986 elections. Plaintiffs' Exhibit P-I H-10.[23] This analysis demonstrates that an Anglo bloc vote exists. Dr. Engstrom testified that the Anglo or white bloc vote in Harris County is sufficiently strong to generally defeat the choice of the Black community. This Court agrees.

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[23] These candidates are: Bonnie Fitch, Raymond Fisher, Francis Williams, Sheila Jackson Lee, and Cheryl Irvin.

o. Plaintiff-Intervenor Sheila Jackson Lee also testified about political cohesiveness among Black voters in Harris County. Ms. Lee has lived in Harris County approximately 11 years and has been a candidate in several judicial elections. Plaintiffs' Exhibit P-I H-01 pp. 1-2; Exhibit P-I H-10 pp. 1-3. She had many different endorsements and campaign strategies but still lost. She testified that her loss was attributable to not getting enough white votes.

p. This testimony was supported by the deposition summaries of Thomas Routt, Weldon Berry, Francis Williams and Bonnie Fitch.

q. Defendant-Intervenor Wood presented the testimony of Judge Mark Davidson. As a hobby, Judge Davidson analyzes the results of judicial elections in Harris County. His testimony concerned his views on what he has termed "discretionary judicial voters" ("DJV").[24] Judge Davidson testified that 15% of the vote in judicial elections in Harris County were DJV's. The remaining 85% split roughly evenly between straight Democrat party and straight Republican party voting. Based upon his analysis, Judge Davidson believes that race and ethnicity are irrelevant to voting behavior as it relates to the judiciary in Harris County. He opines that DJV's determine the outcome of judicial contests in Harris County and the DJV vote can somewhat be garnered by various campaign factors. While this Court finds Judge Davidson to be a credible witness, under controlling law, the Court finds that his testimony is irrelevant.

r. The Court further finds Defendant-Intervenor Wood's contention that the Black preferred candidate lost their respective judicial race due to their failure to win the Harris County bar or preference poll or to obtain the Gay

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[24] He defines DJC's as voters who vote for at least one judicial candidate of one party and at least one of the other party. DJV's are also referred to as "swing" voters.

Political Caucus ("GPC"), endorsement to be legally incompetent.

s. The complete data set used by Dr. Engstrom was used by Defendant's expert, Dr. Delbert Taebel for his analysis of Harris County. Dr. Taebel did not weight his precinct data to account for variations in population size of various precincts in Harris County or any other county at issue.

t. Dr. Taebel analyzed 23 District Court general elections where minorities opposed white candidates in Harris County. State Defendants' Exhibit D-05 pp. 9, 13, 29, 33, 37, 41, 45, 53, 61, 81, 85, 89, 93, 97, 101, 105, 137, 141, 145, 161, 165, 173 & 177. Black and white voters voted differently in all 23 District Court elections. *Id.* The Black preferred candidate won only six (6) times. The Black preferred candidate won seven (7) of 11 County Court general elections. *Id.* D-05 pp. 1, 5, 17, 21, 25, 109, 113, 117, 121, 125 & 129. Blacks and whites voted differently in each of those elections. *Id.* Dr. Taebel also analyzed nine (9) judicial primary elections; seven (7) for District Court posts and two (2) County Court posts. *Id.* D-05 pp. 49, 57, 65, 73, 77, 145, 157, 169 & 181. The Black preferred candidate won six (6) of the nine (9) primaries. Interestingly enough, each preferred candidate winning the primary lost the general election. *Id.* D-05 pp. 61, 69, 81, 153, 161 & 173.

17. *Dallas County.*

a. Dr. Engstrom used the same data set for his analysis of Dallas County. However, the 1980 Census counts were updated in 1982 and 1988 by the Dallas County Elections Office by reconfiguring precincts according to the changes made in precinct lines. Testimony of Dr. Richard Engstrom. Dr. Engstrom accepted the updates census counts for 1982 and 1988 as reliable. *Id.* In the intervening years of 1984 and 1986, Dr. Engstrom looked for precincts that combined or split and aggravated precinct counts for those precincts. *Id.*

b. Dr. Engstrom analyzed seven (7) general elections for State District Court where Blacks opposed

Anglos between 1980 and 1988 in Dallas County. The correlation coefficient or "r" values exceed 0.864 (86%) for six (6) of the seven (7) elections analyzed. *See* Appendix A, Plaintiffs' Exhibit D-02. Dr. Engstrom's homogenous precinct analysis and regression analysis shows a strong relationship between race and voting patterns in Dallas County. *Id.*, *see* columns 2 & 3. Dr. Engstrom testified that the significance level was much smaller than the generally accepted level of extremely high significance of .05 and that the probability that the Dallas County estimates would have occurred by chance were less than 1 out of 10,000.

c. The lowest r squared for these analyses is approximately .75 (75%). This figure is found from multiplying the r value by itself for Jesse Oliver's judicial race in 1988. This coefficient of determination demonstrates that race explains at least 75% of the variance in voting in at least six (6) of the seven (7) elections relied on by Plaintiffs and Plaintiff-Intervenors.

d. Plaintiffs' Exhibit D-02 further shows that in five (5) of the seven (7) elections as the percentage of Blacks increased in precincts, so did Black support for the preferred candidate of Black voters. *See* Homogeneous precinct analysis, column 2.

e. Bivariate regression analysis reflects a negative correlation for Carolyn Wright's judicial race in 1986. Judge Wright is a Black who ran on the Republican ticket. She received -1.5% of the Black vote and 71.7% of the non-Black vote. Plaintiffs' Exhibit D-02, columns 4 & 5. The correlation coefficient was -0.872 (-87%). *Id.*, column 3. This reflects that, as the percentage of Blacks in voting precincts increases Judge Wright's support decreased. In other words, even though Ms. Wright is Black, she did not receive the support of the Black community. Hence, she was not the preferred candidate of Black voters in Dallas County. Black voters also failed to support Judge Baraka, a Black Republican candidate in 1984.

f. When Dr. Engstrom controlled for Hispanic votes, Dr. Engstrom's regression analysis shows that Blacks

consistently gave more than 97% of their vote to their preferred candidate. *Id.*, *see* last two columns. Dr. Engstrom's analyses shows that Blacks are politically cohesive in general elections for State District Court in Dallas County.

g. His analysis is confirmed by the testimony of Plaintiff-Intervenors' Joan Winn White, Fred Tinsely, H. Ron White and Jesse Oliver. The Exhibits reflect that each Plaintiff-Intervenor received 97% or better of the Black homogenous precincts and at least 83% of the votes in precincts with Black population of 50% to 90%. Plaintiffs' Exhibit P-I D-16 - D-22a.

h. Plaintiffs calculated the percentage of votes for the black preferred candidate, Jesse Oliver, and his white opponent, Brown, in each of the proposed hypothetical single member districts. Plaintiffs' Exhibit D-12a. They repeated this procedure for the judicial races involving the Black preferred candidates in Plaintiffs' Exhibit D-02 and Nathan Brin (an Anglo preferred by Black voters in Dallas County). Plaintiffs' Exhibits D-12b, 12c & 12d. In each instance, the Black community's preferred candidate received a majority of votes in each predominately Black hypothetical district.

i. Defendant-Intervenor Judge Harold Entz ("Judge Entz"), attacks Plaintiffs and Plaintiff-Intervenors evidence on the ground that: (1) the data is based on total population and not voting age registered voters; (2) the analysis does not reflect changes in the distribution of population over time as a result of growth of Dallas suburbs and geographic dispersal of minorities; (3) Dr. Engstrom did not control for absentee or Oriental votes; (4) there is a stronger association between partisan affiliation and success than there is between race and success; and (5) the analysis shows what happened but not why it happened. In support of his fourth attack, Judge Entz argues that five of the seven elections analyzed involved Black candidates who are the candidate of choice, while all seven involved Democratic candidates who were the Black preferred candidate of

choice. Thus, Judge Entz concludes that political party is a better predictor of the Black preferred candidate and that candidate is a victim of partisan politics not discriminatory vote dilution.

j. Dr. Engstrom testified that: (1) he was never given precinct data by race and voting age registered voters; and (2) the range of support for the Democrat candidates between 1980 and 1986 varied 10 to 17 percentage points. Thus, Dr. Engstrom concluded that something other than just straight party voting is going on in judicial elections.

k. Dr. Dan Wiser's testimony confirms Dr. Engstrom's results. Dr. Wiser's data set was based on 1980 Census data, Dallas County election returns and Dallas County precinct data adjusted for changes in precincts. Precincts that split were reconstructed by estimating the part of the precinct that shifted to another and apportioning the registered vote based on the shift and past history. Testimony of Dr. Dan Wiser. The adjusted data was checked against the 1986 Justice Department submissions. *Id.* Plaintiffs' Exhibit P-I D-11. Ninety eight percent (98%) of the vote in homogeneous precincts of 90% Black voters went to the Black preferred candidate. Plaintiffs' Exhibit P-I D-11, D-16 through D-23a. At least 83% of the Black community vote supported the Black preferred candidate in homogenous precincts of between 50% and 90% Black. *Id.*

l. Dr. Wiser calculates that the Asian community only comprised approximately 2.6% of the total Dallas County population as of 1985. Plaintiffs' Exhibit P-I D-03. He testified that the best estimate of the growth of the Asian community between 1985 and the present is supplied by the Bureau of Census. Plaintiffs' Exhibit P-I D-02. He believes there has only been a growth of approximately 3% between 1985 and 1988 and does not agree with estimates of Asian leaders in Dallas County.

m. Plaintiffs and Plaintiff-Intervenors established the third *Gingles* prong by showing that a white bloc vote exists. The Y intercepts calculated by Dr. Engstrom for the Black preferred candidate ranged between 29 and 39 percent

for the seven elections analyzed. Plaintiffs' Exhibit D-02. The highest Y intercepts were 61.8% and 71.7% for Judges Baraka and Wright respectively, the non-preferred candidates. *Id.* The highest percentage of Anglo cross over votes received by the preferred candidate of Black voters was approximately 39 percent. *Id.*, 1980 race involving Joan Winn White. There are 197 precincts in Dallas County that are 90% or greater white population. Plaintiffs' Exhibit P-I D-06 & 07.

n. This is corroborated by Dr. Engstrom's homogenous precinct analysis and Dr. Wiser's analysis. *Id.* at column 1. This analysis demonstrates that an Anglo bloc vote exists. The Court finds on the basis of the exhibits and testimony of Dr. Engstrom and Dr. Wiser that the Anglo or white bloc vote in Dallas County is sufficiently strong to generally defeat the choice of the Black community.

o. Dr. Anthony Champagne testified that judicial elections in Dallas County were characterized by strong partisan affiliation rather than racially polarized voting. Dr. Champagne analyzed contested District Court general elections between 1976 and 1988. Plaintiffs' Exhibit P-I D-06-A. Dr. Champagne bases his opinion on the steady increase of Republican victories in Dallas County over time. Plaintiffs' Exhibit P-I D-07-A pp. 1-2. Only seven (7) of the contested general elections analyzed involved Blacks opposing white candidates. Plaintiffs' Exhibit P-I D-09-A p. 1. No Black candidate running on the Democratic ticket won a general election. Two Black candidates running as Republicans won. *Id.* at 1. The Court noted, *supra*, that it was the non-Black vote that gave rise to the success of these two candidates. *See* Finding of Fact 17.e.

p. Dr. Taebel analyzed nine judicial elections in which Blacks opposed Anglos. In eight of the nine, Blacks and Anglos voted differently. State Defendants Exhibit D-06 pp. 1, 13, 17, 21, 37, 69, 73, 81 & 89; *see* Appendix B, Plaintiffs' re-Evaluation of Dr. Taebel's Reports ("Re-Evaluation") for Dallas County p. 1. The Black preferred candidate won only once. *Id.* This sole victory arose in the

1988 Republican primary. *Id.* The Black choice won only five (5) of the other twelve primary and general District Court and Appellate Court races analyzed. *Id.*; Plaintiffs' Re-Evaluation p. 2.

18. *Tarrant County.*

a. Dr. Robert Brischetto ("Dr. Brischetto") testified concerning on behalf of Plaintiffs and Plaintiff-Intervenors in Tarrant County and the remaining counties at issue. He weighted his analysis in all remaining counties. Dr. Brischetto used Black population data by precinct from the 1980 Census for thirty four (34) precincts in Tarrant County where precinct lines had not changed. He analyzed four (4) elections in which Blacks opposed Anglos in Tarrant County (three judicial elections and the 1988 Democratic Primary). *See* Appendix A, Plaintiffs' Exhibit Ta-02.

b. In Tarrant County and other contested counties where there was a large representation of three ethnic/racial groups, Dr. Brischetto used multiple regression analysis. Dr. Brischetto testified that this approach shows the effect of the percentage of Hispanics in precincts, for example, upon the votes received by a minority candidate, when accounting for the effect of the percentage of Hispanics. The statistical calculation that shows the effect is called the "Partial r."

c. Dr. Brischetto calculated "Partial r" values of -87%, -80% and 90% respectively for the three judicial elections analyzed. Plaintiffs' Exhibit Ta-02. There was a negative correlation in the 1986 Salvant - Drago race and the 1986 Sturns - Goldsmith race. Salvant and Sturns were Black candidates running as Republicans. They did not receive the support of the Black community. *Id.* Approximately 93% of the Black voters in precincts analyzed voted for Drago, while approximately 85% of Black voters voted for Goldsmith. *Id.* The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. Testimony of Dr. Robert Brischetto. Dr. Brischetto's regression analysis shows a strong relationship between race and voting patterns in Tarrant County. The

strength of the correlation is dependent on the size of the number not on the positive or negative value assigned to it. The negative correlation in the Salvant and Sturns races merely reflects that as the percentage of Blacks in voting precincts increases, the support for Salvant and Sturns decreased.

d. The lowest r squared for these analyses is approximately 64% for the 1986 race for Criminal District Court Place 1. Race explains at least 64% of the variance in voting in all elections relied on by Plaintiffs and Plaintiff-Intervenors in Tarrant County.

e. Plaintiffs' Exhibit Ta-02 further analyzes the Jesse Jackson Democratic Presidential Primary in 1988. The Partial r for Jesse Jackson was 98%. Although the Jackson race was not a judicial election, its analysis corroborates the judicial elections analyzed. However, Dr. Brischetto testified that he would reach the same conclusions without considering the Jackson contest.

f. Dr. Brischetto's homogenous precinct analysis corroborates the results of his regression analysis. Plaintiffs' Exhibit Ta-02. It shows that Black voters in Tarrant County gave more than 89% of their votes to the preferred candidate of Black voters in every election analyzed.

g. Dr. Brischetto also recompiled and reanalyzed Dr. Taebel's work concerning Tarrant County. Plaintiffs' Exhibit Ta-10. Plaintiffs' Exhibit Ta-10 compiles all of Dr. Taebel's analysis of countywide elections for judicial positions when Blacks opposed Anglos. Dr. Taebel also found negative correlation of -63% and -60% in the Salvant and Sturns elections respectively. *Id.* While these correlation figures are not as high as those found by Dr. Brischetto, they still reflect a strong correlation. *See* Finding of Fact 16.b last sentence.

h. Dr. Taebel used bivariate regression in his analysis. Dr. Brischetto is of the opinion that had Dr. Taebel used multivariate analysis, his correlation estimates would have been more precise. Further, Dr. Brischetto believes that the r values would have been higher, because

the analysis would have eliminated the effect of Hispanics. While Dr. Brischetto did not agree with Dr. Taebel's statistical methodology, he reviewed Dr. Taebel's work because Dr. Taebel's data set was more complete.

i. This Court finds, on the basis of all of Dr. Brischetto's analysis, the Black community in Tarrant County votes cohesively in general elections for State District Court Judges.

j. The Court further finds that the Anglo bloc vote in Tarrant County is sufficiently strong to defeat the minority community's preferred candidate. In the three general elections analyzed, the preferred candidate of Black voters lost every time. This is true even though each of the Black preferred candidates had a sizeable percent of Anglo cross over votes. Plaintiffs' Exhibits' Ta-02; Ta-10. The Y intercept reflects that Anglo support for the Black preferred candidates was between 42% and 49%. *Id.* Ta-02.

k. The testimony of Plaintiff and sitting District Judge Maryellen Hicks corroborates this analysis. Judge Hicks is Black. She testified that the only time she ran against an Anglo in a countywide judicial election she lost. Plaintiffs' Exhibit Ta-10, County Criminal Court Place 1. She feels that she lost because she could not convince Anglos to vote for her. She also believes that she could not win if she had Anglo opposition because of the Anglo vote.

l. Judge Hicks testified that implementation of single member districts in Tarrant County had immediate effects. Before the districts went into effect, only two Blacks had been elected to School Trustee positions. Since single member districts were implemented two Blacks and one Hispanic have consistently been Trustees. Two Blacks and one Hispanic also took office on the Fort Worth City Council as a result of single member districts being implemented for that body. Further, after single member districts were established for State Representative offices, two minorities were elected to the Texas House of

Representatives.[25]

m. In the five primary and general judicial elections involving Black candidates analyzed by Dr. Taebel, the Black choice won only once. State Defendants Exhibit D-39 pp. 1, 29, 33, 37 & 57; *See* Appendix B, Re-Evaluation for Tarrant County p. 1. It is clear that Blacks and Anglos voted differently in these races. *Id.* In District Court general elections that did not have a Black candidate, the candidate preferred by Black voters won three (3) of five (5) times. *Id.* D-39 pp. 13, 17, 21, 25 & 61; Re-Evaluation at 1-2. In three other judicial general elections the candidate of choice of the Black community won all three times. *Id.* D-39 pp. 9, 49 & 65; Re-Evaluation at 2. Two of the three were Appellate Court elections, while the third involved the County Court at Law. *Id.* The candidate of choice also won all three primary judicial elections analyzed by Dr. Taebel. *Id.* D-39 pp. 5, 41 & 49.

19. *Bexar County.*

a. Dr. Brischetto based his analysis of Bexar County on Spanish surnamed registered voter data by precinct from the office of the Secretary of State of Texas. Dr. Brischetto testified that this data was the closest measure of actual registration data by precinct. Dr. Brischetto used bivariate regression analysis in Bexar County because of the very small Black population in the County.

b. He analyzed six (6) general elections from 1980 to 1988 in which Hispanics opposed Anglos. *See* Appendix A, Plaintiffs' Exhibit B-02. He calculated "r" values for Hispanic preferred candidates between 86% and 88%. *Id.* His regression analysis shows a strong relationship between race and voting patterns in Bexar County. In all but one race, as the percentage of Hispanics increased, support for the Hispanic preferred candidate increased. Dr. Brischetto testified that the probability that correlation of

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[25] After the lines were redrawn in 1982, one minority has been elected.

this size would happen by chance was much smaller than the generally accepted level of .05.[26]

c. In the 1982 Barrera - Stohlhandski race, the Hispanic candidate, Roy Barrera, Jr. running as a Republican, received very little Hispanic support. the correlation coefficient for Mr. Barrera was -80%. *Id.* As the percentage of Hispanics in voting precincts increased, Barrera's support decreased. Barrera received approximately 17% of the Hispanic vote. *Id.* He was not the preferred candidate of Hispanic voters in Bexar County.

d. The lowest r squared for these analyses is approximately 64% for Mr. Stohlhandski, an Anglo running as a Democrat in the 1982 Barrera - Stohlhandski race. The highest r squared was 77% for the 1986 Cisneros - Peeples race. This demonstrates in Bexar County that race explains at least 64% to 77% of the variance in voting in all six elections.

e. Dr. Brischetto's background and homogeneous precinct analysis confirm the fact that Hispanics are politically cohesive in Bexar County. Dr. Brischetto lives in Bexar County and analyzed election behavior there in a Section 2 case involving the San Antonio River Authority. Plaintiffs' Exhibit B-16. There he found polarized voting along racial and ethnic lines in a nonpartisan election involving low profile campaigns. Dr. Brischetto's homogeneous precinct analysis shows that Hispanic voters in Bexar County gave 73% to 93% of their votes to the preferred candidate of Hispanic voters in every election.

f. Dr. Brischetto controlled for absentee votes in 1988 elections based on allocated data from the Bexar County Elections Administrator. He testified that the additional data did not change his conclusions.

g. Plaintiffs presented evidence from four

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[26] The significance level for each election is .0000. Plaintiffs' Exhibit B-02. Dr. Brischetto testified that there was practically no [or zero] probability that these correlations would happen by chance.

hypothetical districts carved out of existing precincts for each of the six elections analyzed. Plaintiffs' Exhibits B-12a - 12e. Almost always, the Hispanic candidate who actually lost at-large would have won if he had run from a hypothetical majority Hispanic district. In one case, the 1988 Republican primary between Arellano and White, the Hispanic candidate won in only three of the four hypothetical districts. *Id.* B-12e.

h. In the 1988 Arellano - White Republican primary for the 150th District Court, Arellano ran as an appointed incumbent. White, an Anglo, decided late in the campaign that he did not want to run for office. It was too late to withdraw, but he endorsed his opponent Arellano. White nevertheless won. Adam Serrata testified in his deposition that this was a classic example of polarized voting. Deposition Summary of Adam Serrata ("Serrata Depo.").

i. Other testimony suggests the same conclusion. Judge Anthony Ferro testified in his deposition that he ran for County Court at Law four times in Bexar County. He won two races were he did not have Anglo opposition. Deposition Summary of Anthony Ferro ("Ferro Depo.") at 1. Both Messrs. Serrata and Ferro testified that it is not possible to get elected in Bexar County to the position of District Judge without Anglo support. *Id.*; Serrata Depo.

j. Dr. Brischetto further concluded that the Anglo bloc vote in Bexar County is sufficiently strong to defeat the Hispanic community's preferred candidate. In the six elections analyzed, the preferred candidate of Hispanic voters won only once. *See* 1988 Mireles - Bowles race. The Y intercept reflects that non-Hispanic support for the Hispanic preferred candidates was between 18% and 35%. It is not surprising that the one Hispanic candidate of choice who won also received the highest percent of Anglo cross over votes.

k. Judge Ferro testified that he has only been able to get elected when he did not have an Anglo opponent. Ferro Depo. Judge Paul Canales testified that

voters in Bexar County pay attention to the race/ethnicity of candidates in judicial elections.

l. The effect of fairly drawn single member districts has had a positive effect on minority election results in Bexar County. Immediately after the creation of single member districts in *White v. Regester*, Hispanics were elected to the Texas House of Representatives. Further, immediately after the City Council implemented single member districts, the number of minorities on the San Antonio City Council increased. Serrata Depo.; Ferro Depo.

m. Whites and Hispanics voted differently in 28 of the 29 judicial elections involving Hispanic candidates in Bexar County. State Defendants Exhibit D-07 pp. 2-5 & 7-28; *see* Appendix B, Re-Evaluation for Bexar County p. 1-2. In the twelve general elections analyzed by Dr. Taebel, the Hispanic preferred candidates won three (3) times. *Id.* D-07 pp. 4, 5, 7, 15-16, 18-21 & 25-28; Re-Evaluation at 1. Only one of those was a District Court election. *Id.* D-07 at 5. The Hispanic choice won six (6) out of 18 primary elections. *Id.* Re-Evaluation at 1-2.

20. *Travis County.*

a. Dr. Brischetto analyzed three (3) 1988 countywide judicial elections in Travis County: one primary election for the 345th District Court and two County Court at Law general elections. Dr. Brischetto testified that there has only been one Hispanic - Anglo District Court election between 1978 and 1988. In that race, the Anglo won. Plaintiffs' Exhibit Tr-11; Testimony of Jim Coronado. Mr. David Richards testified that the Republican party is significant in Travis County. Hence, Mr. Richards concluded that the Democratic Primary is the true testing ground for opposed candidates in judicial elections.

b. Dr. Brischetto used Hispanic population data by precinct from the 1980 Census reconfigured to 1988 precinct boundaries. He based his polarization and homogenous precinct analysis on total population figures for Blacks, Hispanics and Anglos in approximately 178 precincts

(virtually all of them) in the County. Amalia Rodriguez Mendoza, the Travis County Registrar of Voters, provided the data.

c. Dr. Brischetto's multivariate or multiple regression analysis shows that the Hispanic community in Travis County is politically cohesive, when the effect of the Black vote is considered. Dr. Brischetto calculated "Partial r" values of 84%, 85% and 90% respectively for the three judicial elections analyzed. *See* Appendix A, Plaintiffs' Exhibit Tr-02. The Hispanic preferred candidate received at least 77% of the Hispanic vote in one election[27], 93% in the Democratic Primary election and 95 in the Garcia - Phillips race. *Id.* The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. Testimony of Dr. Robert Brischetto. Dr. Brischetto's regression analysis shows a strong relationship between race and voting patterns in Travis County.

d. The homogenous precinct analysis for Travis County establishes a similar pattern. Plaintiffs' Exhibit Ta-02. It shows that Hispanic voters gave more than 63% and as high as 90% of their votes to the Hispanic preferred candidate.

e. Dr. Brischetto also reanalyzed the same three elections using bivariate regression analysis based upon voter registration data. *See* Appendix A, Plaintiffs' Exhibit Tr-19. These correlation figures are very close to those calculated using multivariate analysis, and clearly reflect strong correlation. *See* Finding of Fact 16.b. last sentence. With either data set, Dr. Brischetto's analysis shows that as the percentage of Hispanics in precincts increase, so does support for the Hispanic preferred candidate. The r squared figures all exceed approximately 64%.

f. The Hispanic preferred candidates took the

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[27] The 1988 County Court at Law race between Castro Kennedy and Hughes. Castro is the Hispanic preferred candidate. Plaintiffs' Exhibit Tr-02.

majority of the votes from Plaintiffs' hypothetical districts even though they lost countywide. Plaintiffs' Exhibit Tr-12.

g. The State Defendants were concerned that Plaintiff's did not analyze Statewide judicial or legislative elections. *See* Cross examination of Jim Coronado; Cross examination of Dr. Brischetto. Dr. Brischetto testified that Plaintiffs focused on local elections when that data was available and these elections were not reached in Plaintiffs' hierarchy of priority. He further testified that the elections analyzed were the closest in nature to District Court elections. Dr. Brischetto felt that once he had three elections he could determine a sufficient pattern. This Court agrees.[28]

h. The State Defendants attack Dr. Brischetto's analysis on the ground that he did not take into account: (1) absentee voting; and (2) the number of non-United States citizens, Blacks or Anglos with Spanish surnamed in Travis County.

i. Dr. Brischetto controlled for absentee votes in 1988 elections in Bexar County. He testified that Bexar County had the highest absentee voting than anywhere in the State. He concluded in his Bexar County analysis that absentee voting did not change his conclusions. *See* Findings of Fact 19.f. This Court finds that the results would not be significantly different in Travis County.

j. Spanish surname counts were based on persons who identified themselves in Census counts as being of Spanish origin. While the Court recognizes that the Census definition of Spanish origin includes many parallel ethnic backgrounds, this Court finds that the probability of overlap of Black and/or White voters is very slight.

k. Finally, the State Defendants claim that the analyses of the Democratic Primary between Judge Gallardo

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[28] *Gingles* itself relied on only analysis of three elections in Senate District 22 (1978, 1980 & 1982) and House District 21 (1978, 1980 & 1982). *Gingles*, 478 U.S. at Appendix A.

(the Hispanic preferred candidate) and McCown is misleading. Witnesses for the State Defendants testified that Judge Gallardo lost because he was a bad judge. Depositions of Becky Beaver & Fernando Rodriguez; Testimony of David Richards. While this may be true, under controlling law, it is the correlation between the race of the voter and the selection of certain candidates that is crucial to this Court's inquiry. *Gingles*, 478 U.S. at 63.

l. The Court further finds that the Anglo bloc vote in Travis County is sufficiently strong to defeat the minority community's preferred candidate. The preferred candidate of Hispanic voters lost each election analyzed. Two of the Hispanic preferred candidates received approximately one third Anglo cross over votes. Plaintiffs' Exhibits' Tr-02; Tr-19. The other candidate received only approximately 14% Anglo cross over votes. *Id.* Tr-02.

m. In each of the hypothetical districts, the candidate of choice of the Hispanic community received the most votes; in two districts the candidate of choice received a majority.

n. Dr. Taebel analyzed the same three elections analyzed by Plaintiffs' expert. State Defendants Exhibit D-08; *See* Appendix B, Re-Evaluation for Travis County p. 1. His analysis confirms that in these three races whites and Hispanics voted differently and the Hispanic preferred candidate lost each time. *Id.* D-08 pp. 33, 37 & 41. The Hispanic preferred candidate fared better in Appellate elections winning one primary runoff and two general elections. *Id.* D-08 pp. 25, 29 & 45. Hispanic and white voters did not vote differently in these three election contests but did so in the 1984 and 1986 Democratic primary for County Court numbers 1 and 7. *Id.* D-08 pp. 33 & 41.

21. *Jefferson County.*

a. Dr. Brischetto used Black population data by precinct from the 1980 Census for all of his analysis in Jefferson County. He testified that population had changed very little in Jefferson County. Plaintiffs' Post Trial Brief at 95. Only those precincts that retained unchanged boundary

lines were used in his analysis.

b. He analyzed five (5) Democratic primary elections, two (2) Democratic primary runoffs and the 1988 Presidential Democratic primary. *See* Appendix A, Plaintiffs' Exhibit J-02 pp. 1-2. Four of the five primaries analyzed involved Justice of the Peace contests. The fifth was for a County Court at Law post. Dr. Taebel did not analyze any of these elections. State Defendants' Exhibit D-09. Each of the Justice of the Peace election precincts covered at least an entire city which are the largest urban areas of the County. Precinct 1 covers the City of Beaumont, Texas. Precinct 2 covers the City of Port Arthur, Texas. Tom Hanna testified in his Deposition that running for office from these precincts is equivalent to running at large from the two cities. Dr. Brischetto testified that there were no primary or general elections for District Court seats that pitted Black against Anglo.

c. Dr. Brischetto used multivariate regression analysis in his examination of Jefferson County separating out the effect of the Hispanic vote. He calculated "Partial r" values between 66% and 97% for the judicial primaries and runoff elections analyzed. *Id.* The partial r for the Black preferred candidate in the Democratic Presidential Primary, Jesse Jackson, was 97%. *Id.* The likelihood that the estimates would occur by change (significance level) was much smaller than .05. *Id.* Dr. Brischetto's regression analysis shows a strong relationship between race and voting patterns in Jefferson County. The Black preferred candidate received a clear majority of Black community support in at least five of the seven judicial contests analyzed. *Id.*, multivariate and homogeneous analysis for 1972 to 1978. In the 1982 primary for Justice of the Peace, Precinct 1, Place 2, the Black preferred candidate Cannon received approximately 51% of the Black community vote, while two opponents split the remaining 49%.

d. In one instance, the Black preferred candidate did not receive a majority of the Black community vote. In the 1986 Democratic Primary for Justice of the Peace,

Precinct 1, Place 2, the Black preferred candidate, Wilmer Roberts, only received 47% of the Black vote (40% in homogeneous precincts). The other 53% (60% in homogeneous precincts) was split between four candidates. John Paul Davis, a Black attorney from Jefferson Country, testified in his Deposition that he supported the white candidate because she was the most liberal at the time he made his choice and Mr. Roberts announced late in the race.

e. The r squared figures range from 44% for one race (1972 runoff) to 94% for three races (1978 & 1982 judicial primaries and 1988 Presidential primary). It is clear from Dr. Brischetto's analysis of voting patterns in Jefferson County that as the percentage of Blacks increase in a precinct, the percentage of support for the Black preferred candidate increases.

f. Dr. Brischetto examined the votes cast in a hypothetical district for the 1978 Democratic Primary between Mr. Davis and an Anglo opponent. The analysis shows that Davis received more votes in each precinct and a majority of the vote in the district. Plaintiffs' Exhibit J-09.

g. State Defendants argue that the three races analyzed in 1982, 1986 and 1988 either show no racial polarization or a victory for the Black preferred candidate. This Court disagrees. As the Court discussed, *supra*, the Black preferred candidate was supported by a majority of the Black community in the 1982 Democratic Primary. *See* Finding of Fact 21.c. With reference to the 1986 Democratic Primary, the Court finds that the State Defendants' evidence is not conclusive that the Black community either would not have cohesively supported Wilmer Roberts had he announced earlier or that the Black community cohesively supported some other candidate. Plaintiffs' Exhibit J-02; Finding of Fact 21.d. The Court further finds that while Jesse Jackson may have carried Jefferson County in the 1988 Presidential Primary, that fact alone is a far cry from whether the Black preferred candidate is successful in Jefferson County.

h. State Defendants further point to the 1984 Democratic Primary between John Paul Davis and Donald Floyd, both of whom are Black, to demonstrate that the Black community is not politically cohesive in Jefferson County. While Mr. Floyd won the primary and the election, Defendants did not demonstrate that the Black community split their vote or failed to support one candidate over another.

i. This Court finds on the basis of the foregoing discussion that the Black community in Jefferson County votes cohesively in judicial elections.

j. In at least five of the seven elections analyzed it is clear that blacks and whites voted differently and the preferred candidate of Black voters lost every time. The Black communities candidate of choice received 25% to 41% of the Anglo cross over vote in election years 1972 and 1974. The percentage dropped thereafter to a low of 2% for Wilmer Roberts in 1986 and a range of 7% to 10% for the other two judicial races. Plaintiffs' Exhibit' J-02. Although the Black preferred candidate received 70% to 93% of the Black community vote in five of the seven elections analyzed they still lost countywide.

k. The Court finds that the Anglo bloc vote in Jefferson County is sufficiently strong to defeat the minority community's preferred candidate.

l. No Black attorney has run for the position of District Judge in Jefferson County. Deposition Summary of John Paul Davis. Mr. Davis feels that Black lawyers do not run for the office because of the high probability of defeat. *Id.*

m. Implementation of single member legislative and Commissioner's Court districts resulted in the election of Black preferred candidates to those positions. Deposition Summary of Thomas Hanna.

22. *Lubbock County*

a. Dr. Brischetto used population data from the 1980 Census precinct boundaries for his analysis in Lubbock County. He initially based his review on 30 of 76 precincts

which had not changed between 1980 and the relevant elections analyzed. The analyzed additional precincts that he was able to reconfigure by use of Census block maps.[29]

b. Dr. Brischetto relied on appellate judicial contests. He testified that no relevant local judicial contests involved a minority opposed by an Anglo candidate. He further testified that he did not analyze local Justice of the Peace races because the Justice of the Peace precincts were not at least as large as a major city. He analyzed two (2) Supreme Court general elections, two (2) Democratic primary elections and two (2) Democratic primary runoffs. *See* Appendix A, Plaintiffs' Exhibit L-02, pp. 1-3.

c. Dr. Brischetto used bivariate, multivariate regression and homogeneous precinct analysis in his examination of Lubbock County. The bivariate analysis produced correlation coefficients in excess of 87% with a corresponding r square figure of 76%. *Id.* He used multiple regression analysis to show that Blacks and Hispanics vote together. This analysis revealed that the two groups favored the same candidates in each election. *Id.* The lowest partial r calculated for Hispanic voters was 78% in the 1986 Democratic Runoff for Supreme Court place 4. The lowest partial r for Black voters was 56% in the 1986 Democratic Primary for the same Court prior to the runoff election. The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. *Id.* Dr. Brischetto's regression and homogeneous precinct analysis shows a strong relationship between race/ethnicity and voting patterns in Lubbock County. The combined minority preferred candidate received a clear majority of combined minority community support in each election analyzed. *Id.*

d. It is clear from Dr. Brischetto's analysis of

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[29] He analyzed 48 of the 76 total precincts in the 1986 primary, 44 of 76 in the 1986 runoff, 48 in the 1986 general election and 47 in the 1988 general election. *See* Plaintiffs' Post Trial Brief at 109 n.55.

voting patterns in Lubbock County that as the percentage of minorities increase in a precinct, the percentage of support for the minority preferred candidate increases. This Court finds that Blacks and Hispanics are cohesive as a group in Lubbock County judicial elections.

e. Maria Luisa Mercado, a Hispanic attorney from Lubbock County, testified that Blacks and Hispanics work together in the County on many significant issues. Deposition Summary of Maria Luisa Mercado ("Mercado Depo.").

f. The State Defendants point to the 1984 race for Justice of the Peace between Sedeno, a Hispanic candidate running as a Democrat, against a Black Republican candidate, McKinley Shephard to illustrate that Blacks and Hispanics do not vote cohesively as a group. The Black boxes voted for Mr. Shephard. Mercado Depo. at 2. Dr. Brischetto testified that this race was not analyzed because the Justice of the Peace precinct in question split the City in half. "It did not include a large majority of the County or a large metropolitan area." Testimony of Dr. Robert Brischetto. This Court finds that the Sedeno - Shephard race does not illustrate that Blacks and Hispanics do not vote cohesively in at-large judicial elections. The Court further finds that Blacks and Hispanics opposing each other says less about the collective cohesiveness of the two groups when either opposes an Anglo.[30]

g. Minorities and whites voted differently in each election analyzed. However, the preferred minority candidate won on two of six occasions. Plaintiffs' Exhibit L-02, p. 2, 1986 Primary for Court of Criminal Appeals, Place 1 and 1986 Runoff. In one of those two races, the minority preferred candidate received 46% of the Anglo cross over votes from homogeneous white precincts of 90% to 100% white population. *Id.*, 1986 Runoff. The minority

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[30] State Defendants further point to Hispanic - Black state representative races in Lubbock County in 1984 and 1986.

communities candidate of choice received 39%, 40% and 41% of the Anglo cross over vote, respectively, in three other elections and still lost. *Id.*, 1986 General Election, 1988 General Election and 1986 Democratic Primary, Supreme Court, Place 4, respectively. The Court finds that the Anglo bloc vote in Lubbock County is sufficiently strong to defeat the minority community's preferred candidate.

h. Defendants argue that Justice Gonzalez may possibly have received more Anglo votes in the 1986 Democratic Runoff with 36% than either of his three opponents, assuming the remaining 64% of the Anglo votes were evenly split. Defendants conclude on that basis that Anglos did not vote overwhelmingly against Justice Gonzalez. This Court disagrees. Assuming arguendo that Defendants assumption is correct, the Court finds that Anglo's did overwhelmingly vote against Justice Gonzalez even if they did not vote overwhelmingly for a different candidate.

i. Dr. Brischetto testified concerning some countywide elections in *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984). His conclusions in *Jones* corroborate his testimony in this case.

j. Ms. Mercado testified that Black and Hispanic candidates have not been successful in at large elections. Mercado Depo. She testified that she carried all minority boxes and zero Anglo boxes in her 1978 bid for City Council. *Id.* Blacks and Hispanics have been successful running for School Board and County Commissioner's positions after the implementation of single member districts. *Id.*

k. Dr. Taebel only analyzed two of the same Appellate Court contests analyzed by Dr. Brischetto. State Defendants' Exhibit D-10 pp. 17 & 25. In both, minorities and whites voted differently and the minority choice lost. Similar results were obtained in two County Court at Law General Elections analyzed by Dr. Taebel. *Id.* D-10 pp. 5 & 9. However, in those two races there was no minority candidate. *See* Appendix B, Re-Evaluation of Lubbock

County.

23. *Ector County*

a. Dr. Brischetto used population data from the 1980 Census precinct boundaries to analyze 24 of the 31 total precincts in Ector County which had not changed between 1980 and the relevant elections analyzed. As in Lubbock County, he relied on appellate judicial contests. He analyzed two (2) Supreme Court General Elections and two (2) Democratic Primary Elections. *See* Appendix A, Plaintiffs' Exhibit E-02, pp. 1-2. He testified that no County or District Court contests involved a minority opposed by an Anglo candidate.

b. Dr. Brischetto used the same statistical analysis used in Lubbock County. Bivariate analysis was used to separate the white and minority votes. Testimony of Dr. Robert Brischetto. Multivariate analysis was used to separate the Black and Hispanic vote. *Id.* The bivariate analysis produced correlation coefficients in excess of 78% with a corresponding r square figure of 61%. Plaintiffs' Exhibit E-02, pp. 1-2. Multiple regression analysis shows that Blacks and Hispanics vote together. This analysis revealed that the two groups favored the same candidates in each election. *Id.* The lowest partial r calculated for Hispanic voters was 46% in the 1986 Democratic Primary for Supreme Court Place 4. The lowest partial r for Black voters was 60% in the 1988 General Election for Supreme Court, Place 3. The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. Testimony of Dr. Robert Brischetto.

c. A clear majority of the combined minority community supported the preferred minority candidate in each election analyzed. Even in the race for Supreme Court, Place 4, Justice Gonzalez, received 42% of the Hispanic vote and 65% of the Black community vote. *Id.* Dr. Brischetto's regression and homogeneous precinct analysis shows a strong relationship between race/ethnicity and voting patterns in Ector County. The lowest level of combined support is reflected as 50% in the Democratic

Primary for Supreme Court, Place 4. *Id.*, Homogeneous precinct analysis, p. 2. Dr. Brischetto attributes the lack of stronger minority group cohesiveness in that race to the fact that one of the candidates in the Primary was from Ector County. *Id.*, Candidate Gibson. However, in the General Elections for 1986 and 1988, homogeneous precincts of 80% or more combined minority gave more than 80% of their vote to the minority preferred candidate.

d. It is clear from Dr. Brischetto's analysis of voting patterns in Ector County that as the percentage of minorities increase in a precinct, the percentage of support for the minority preferred candidate increases. This Court finds that Blacks and Hispanics are cohesive as a group in Ector County judicial elections.

e. Minorities and whites voted differently in each election analyzed. Minorities supported the minority preferred candidates in much greater percentages than Anglo voters. The preferred minority candidate won only one race analyzed. *See* Plaintiffs' Exhibit E-02, p. 2, 1986 Primary for Court of Criminal Appeals, Place 1.

f. Minorities have been elected to Justice of the Peace and County Commissioner's positions from predominately minority precincts. Deposition Summary of Lawrence Leo Barber ("Barber Depo.")

g. Dr. Taebel's analysis of the same two Appellate Court contests confirmed Dr. Brischetto's analysis. State Defendants' Exhibit D-11 pp. 21 & 37. In both, minorities and whites voted differently and the minority choice lost. Dr. Taebel further analyzed five (5) General Election judicial contests that did not involve positing an Anglo against a minority. *Id.* pp. 5, 9, 13, 29 & 33. Minorities and whites voted differently and the minority preferred candidate lost in three of the five. *See* Appendix B, Re-Evaluation of Ector County.

24. *Midland County*

a. Dr. Brischetto based his analysis on population data from the 1980 Census. He analyzed 11 of the 36 total precincts for 1986 and 10 of 36 for 1988 that had

boundaries that had not changed. He was also able to reconfigure boundaries for 22 precincts in 1986 and 23 in 1988. Testimony of Dr. Robert Brischetto. He relied on appellate races and one Justice of the Peace race since there have been no local countywide election contests in which minorities opposed Anglos. The Justice of the Peace race encompassed the entire City of Midland. Testimony of Aquilla Watson. He analyzed three elections in total. *See* Appendix A, Plaintiffs' Exhibit M-02. Dr. Taebel did not analyze the Justice of the Peace contest.

b. Dr. Brischetto used bivariate regression analysis in Midland County. The bivariate analysis produced correlation coefficients in excess of 89% with a corresponding r square figure of 79%. *Id.* Better than 85% of the combined minority voted for the minority preferred candidate in each race. *Id.* The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. Testimony of Dr. Robert Brischetto. Dr. Brischetto's regression and homogeneous precinct analysis shows a strong relationship between race/ethnicity and voting patterns in Midland County.

c. It is clear from Dr. Brischetto's analysis of voting patterns in Midland County that as the percentage of minorities increase in a precinct, the percentage of support for the minority preferred candidate increases. This Court finds that Blacks and Hispanics are cohesive as a group in Midland County judicial elections.

d. It is further clear that minorities and whites voted differently in each election analyzed. Minorities supported the minority preferred candidate in much greater percentages than Anglo voters. The preferred minority candidate lost each race analyzed despite the large percentages of combined minority support. *Id.*

e. This analysis is supported by Dr. Brischetto's analysis and testimony in *Lulac v. Midland ISD*, 648 F.Supp. 596, 600 (W.D. Tex. 1986), *aff'd*, 812 F.2d 1491 (5th Cir. 1987), *vacated* 829 F.2d. 546. Plaintiffs' Exhibit M-05.

f. Aquilla Watson testified that she received very

few Anglo votes. She only carried four (4) of the thirty-six (36) precincts. Only one of the four included some Anglo cross over votes. Testimony of Aquilla Watson. Minorities have been elected to the School Board and County Commissioner's Court from predominately single member districts. *Id.*

g. Dr. Taebel analyzed four (4) judicial contests in which a minority candidate ran against one or more white candidates. State Defendants' Exhibit D-12 pp. 9, 21, 25 & 29. Minorities and whites voted differently and the minority choice lost in the two General Elections analyzed. *Id.* pp. 25 & 29. The minority choice also lost in both primary elections, but there is some indication that minorities and some white voters voted the same. *Id.* pp. 9 & 21. *See* Appendix B, Re-Evaluation of Midland County.

ACCESS TO THE POLITICAL PROCESS

History of Discrimination

25. The effect of past discrimination against Blacks and Hispanics in areas such as education, employment and health in most of the Counties in question is either well chronicled or undisputed. *See, e.g., Lulac v. Midland ISD*, 648 F.Supp. 596, 600 (W.D. Tex. 1986), *aff'd*, 812 F.2d 1491 (5th Cir. 1987), *vacated* 829 F.2d 546; *Campos v. City of Baytown*, 840 F.2d 1240, 1243 (5th Cir. 1988), *reh'g denied*, 849 F.2d 1240, *cert. denied*, U.S. (1989); *Lipscomb v. Jonsson*, 459 F.2d 335 (5th Cir. 1972); *Graves v. Barnes*, 343 F.Supp. 704, 725 n.15, 730-34 (W.D. Tex. 1972), *rev'd in part and remanded sub nom, White v. Regester*, 412 U.S. 755 (1973), *on remand*, 378 F.Supp. 640, 644 (1974); *Terrazas v. Clements*, 581 F.Supp. 1329, 1334 (N.D. Tex. 1984); *United States v. Texas Ed. Agcy., Etc.*, 564 F.2d 162, 163 (5th Cir. 1977), *reh'g denied*, 579 F.2d 910 (1978), *cert. denied*, 443 U.S. 915 (1979); *Blackshear Residents Organization v. Housing Auth. of City of Austin*, 347 F.Supp. 1138 (W.D. Tex. 1971); *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984); *United States v. CRUCIAL*, 722 F.2d 1183, 1185 (5th Cir. 1983). *See also* Plaintiffs and Plaintiff-Intervenors Exhibits reflecting social stratification.

26. This history touched upon many aspects of the lives of minorities in the Counties in question including their access to and participation in the democratic system governing this State and their socio-economic status. "The administration of justice in Texas was overwhelmingly dominated by Anglo males in 1968, and the overall pattern [had] changed very little" by 1978. Plaintiffs' General Exhibit ("Gen") 02, *Texas: The State of Civil Rights (Ten Years Later, 1968-1978)*, A Report of the Texas Advisory Committee to the United States Commission on Civil Rights at 22 (1980); *City of Port Arthur, Texas v. United States, et al.*, 517 F.Supp. 987, 1020 (D.D.C. 1981)(three judge court), *aff'd*, 459 U.S. 159 (1982).

Enhancement

27. Candidates for District Court must run for a specific Judicial District Court seat. This is equivalent to a numbered post system.[31] District Judges must be nominated in the primary by a majority of the votes.

> "This provision insures that essentially white voting majorities have a 'second shot' at [minority] candidates who have failed to muster a majority of the votes in the first election. Time and again, in election after election, minority candidates win a plurality in the first election, only to lose the runoff in highly racially polarized voting."

Testimony of Dr. Charles Cotrell at 491, Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate (94th Cong. 1st Sess.) S. 407, S. 903, S. 1409, S. 1443 (1975); Plaintiffs' Exhibit Gen.-03 at 491. Finally, the size of at least

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[31] "A numbered-post system requires a candidate to declare for a particular seat on a [G]overnmental body. The candidate then runs only against other candidates who have declared for that position. The voters then have one vote for that seat. The system prevents the use of bullet, or single shot, voting. *Campos*, 840 F.2d at 1242 n.1 [*citing Gingles*, 478 U.S. 38-9 nn. 5 & 6].

five of the nine target counties further enhance the problems that minority candidates face when they seek office. Plaintiffs' Exhibit Tr-15 shows that Harris, Dallas, Tarrant, Bexar and Travis Counties have very large populations. *See also* Plaintiffs' Exhibit P-I D-4.

Slating

28. Slating has been defined as the creation of a package or slate of candidates, before filing for office, by an organization with sufficient strength to make the election merely a stamp of approval of the pre-ordained candidate group. *Overton*, 871 F.2d at 534. Dr. Wiser depicted the Republican Party in Dallas County as a white-dominant slating group. This Court finds that such characterization is at odds with the governing law and facts of this case. Plaintiffs and Plaintiff-Intervenors did not present evidence of slating in Harris, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland Counties.

Racial Appeals

29. Plaintiff-Intervenor for Dallas County, Joan Winn White, argued that racial appeals were injected into her 1980 judicial race against Charles Ben Howell when an advertisement he ran made reference to his opponent (Ms. White) as the "affirmative action appointee." Plaintiffs Exhibit P-I D-30. The Court notes and Ms. White testified that the term "affirmative action" is used in reference to sex as well as race. The Court finds that there is nothing inherently racist about referring to an affirmative action judicial appointment.

30. Plaintiff-Intervenors from Dallas County also argue that racial appeals were inserted into the 1986 election between Royce West and John Vance and the 1988 Republican Primary between Larry Baraka and Brook Busby. This Court agrees. In the West - Vance race, Mr. Vance made a racial appeal by inserting his opponent's picture in a campaign advertisement financed by Mr. Vance's campaign. In the Baraka - Busby race, Ms. Busby campaigned with literature pointing out that her opponent was a Black Muslim. Plaintiffs and Plaintiff-Intervenors did

not present evidence of racial appeals in the remaining Counties at issue.

Electoral Success

31. Since 1980, seventeen Blacks have run for State District Court Judge in Harris County. Only 2 (approx. 12%) won. Plaintiffs' Exhibit H 07. Seven Blacks have opposed Anglos in District Court General Elections in Dallas County and won only two elections (29%). Plaintiffs' Exhibit D-09. However, neither of these candidates was the candidate of choice of the Black community. Only one Hispanic candidate of choice won in Bexar County in six Hispanic - Anglo elections. Plaintiffs' Exhibit B-11. The Black community's preferred choice achieved the District Court bench only once out of three elections when Blacks ran against Anglos in Tarrant County. Plaintiffs' Exhibit Ta-07. Only one Hispanic candidate ever ran against an Anglo for a District Judge seat in Travis County. The Hispanic candidate lost. Plaintiffs' Exhibit Tr-11. No minority candidate has run for the office of District Court Judge in Jefferson County. John Paul Davis testified at his deposition that the at-large system discourages eligible Black attorneys from running because the chance of success is so slim. At least three Black attorneys sought appointment to the District Court bench. Deposition Summary of John Paul Davis ("Davis Depo."). Similar testimony was elicited on behalf of Plaintiffs in Lubbock County. Mercado Depo. No minority candidate has run for District Court Judge in Lubbock, Ector or Midland County.

32. State Defendants argue that the eligible pool of minority lawyers, rather than eligible minority voters, is the appropriate reference point for evaluating the extent of electoral success. State Plaintiffs' Exhibit D-04. The Court notes that the two cases relied upon by the State involve Title VII issues and do not address the relevant statistical pool in a § 2 case. *See Richmond v. J.A. Croson Co.*, 109 S.Ct. 706, 725-26 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115, 2121-22 (1989). State Defendants recognize that the pool of eligible lawyers is small, due in part, to

historical discrimination. The Court finds that even if there is some relationship between the low number of minority judges and the number of eligible minority lawyers, that fact does not explain why well qualified eligible minority lawyers lose judicial elections.

Responsiveness

33. This Court cannot find anything in the record to suggest a lack of responsiveness on the part of Judges in any of the Counties in question to the particularized needs of members of the minority community.

Tenuousness

34. Several reasons were offered for the maintenance of the at-large system. State Defendants and Defendant-Intervenor Wood argued that (1) judges elected from smaller districts would be more susceptible to undue influence by organized crime; (2) changes in the current system would result in costly administrative changes for District Clerk's offices; and (3) the system of specialized courts in some counties would disenfranchise all voters rights to elect judges with jurisdiction over some matters. Plaintiff-Intervenors, HLA, allege that the at large scheme was adopted with the intention to discriminate against Black voters in violation of the Fourteenth Amendment to the United States Constitution.

35. Chief Justice of the Texas Supreme Court, Thomas Phillips, testified that the purpose of Article 5, Section 7a(i) of the Texas Constitution was to create the Judicial Districts Board which could equalize the dockets of District Judges. To further that goal, Article 5, Section 7a(i) requires that judges be elected from districts no smaller than a county. Apparently, the rationale for such provision is that District Judges should not be responsible to voters over an area smaller than area where they have primary jurisdiction.

36. Plaintiff-Intervenors offered the Deposition summary of Senator Craig Washington in support of their claim that discriminatory intent was the focus of the legislative deliberations surrounding the passage of Section 7a(i). The Court notes that Senator Washington sat on the

Conference Committee and signed the Conference Committee Report recommending the adoption of the Senate Joint Resolution containing the exact language of Section 7a(i), Tex. S.J. Res. 14, 69th Leg. (1985). *See* Defendant Intervenor Wood's Exhibit 59. Subsequently, Senator Washington on the Senator floor voted for the adoption of S.J. Res. 14. *Id.* The Court further notes that three Hispanic Senators voted in favor of S.J. 14: Senator Barrientos, Senator Truan and Senator Uribe.

37. Plaintiffs and Plaintiff-Intervenors have the burden to establish that the at-large system is maintained on a tenuous basis as a pretext for discrimination. *Overton*, 871 F.2d at 535. While the Court does not find that the present system is maintained on a tenuous basis as a pretext for discrimination, the Court is not persuaded that the reasons offered for its continuation are compelling.

38. Under a single member scheme or some other scheme Judges may be made responsible to voters over an area no smaller or larger than the area where they have primary jurisdiction. This Court finds no reason why all Judges cannot exercise general jurisdiction over their geographic area of responsibility. The Court further finds that administrative functions and jury selection could continue to be done on a countywide basis.

39. Our legislative body has seen fit in the past to create in some counties specialty courts. In the mind of this Court this is wrong. Judges of civil dockets or judges of criminal dockets have equal access to legislation and published opinions. They are not intellectually inferior to judges who hear civil, criminal and domestic cases. The body of law is large, but is handled capably and well by most judges in this State who hear all types of litigation. Lawyers specialize. Judges are capable of rendering fair, honest and just decisions without concentrating in one narrow field of law.

STATE DEFENDANTS' ANALYSIS

General

40. State Defendants argue that the Supreme

Courts incorporation in *Gingles*, of the Senate Report accompanying the 1982 Amendment to § 2, signals a return to the Supreme Court's pre-*Gingles* analysis in *Whitcomb v. Chavis*, 403 U.S. 124 (1971). *In Whitcomb*, the Supreme Court rejected a racial vote dilution challenge to an at-large system for electing state legislators, essentially on the ground that partisan preference best accounted for electoral outcomes in Marion County, Indiana. The Court in *Whitcomb* concluded that there was no indication in the record of that case that Blacks were being denied access to the political system.

41. This Court is not convinced that the State Defendants are making the correct call. In any event, the Court finds that this Court's analysis of the Senate factors applicable to the present case point to the continual effects of historical discrimination hindering the ability of minorities to participate in the political process.

42. Next, State Defendants are of the opinion that there are really two questions before this Court, depending on what electoral stage is being analyzed. At the primary stage the question is whether the minority candidate of choice in the Democratic Primary is prevented more often than not by a Democratic white bloc vote from being the party's nominee in the General Election. State Defendants' Post Trial Brief at 9. At the General Election stage the question becomes whether there is a pattern of substantial desertion from the Democratic party by white voters to vote for a Republican candidate, thereby denying victory to the minority candidate of choice. *Id.* at 10. This Court finds such a distinction unimportant. Assuming the first two elements of the *Gingles* test are met and the Senate factors point to vote dilution, it is unimportant whether a white bloc vote, which is sufficient - absent special circumstances - usually to defeat the minority's preferred candidate, takes place at one election stage, both stages or by Democrats or Republicans.

43. The issue of partisan voting was before the Supreme Court in *Gingles*. The Court had no difficulty

concluding that voting polarized along racial, not partisan, lines. *Gingles*, 478 U.S. at 61-62. Party affiliation is simply irrelevant under the controlling law. Further, "the addition of irrelevant variables [to regression or statistical analysis] distorts the equation and yields results that are indisputably incorrect under § 2 and the Senate Report." *Id.* at 64.

Statistical

44. The complete data set used by Dr. Engstrom in Harris and Dallas Counties was used by Defendant's expert, Dr. Taebel for his analysis of those Counties. Dr. Taebel's data set for analysis in the other seven counties appears to be very similar. He did drop homogeneous precincts from his analysis if there was more than a ten percent (10%) change in precinct boundary census data since the 1980 Census counts. Dr. Taebel analyzed both primary and General Elections in not only minority - Anglo contests, but also minority Republican candidates opposed to white candidates and white - white contests. He also analyzed elections in which the minority preferred candidate ran unopposed. This Court finds that unopposed election contests and white versus white contests are not germane in this Circuit to this Court's analysis. *Westwego Citizens For Better Government v. Westwego*, 872 F.2d 1201, 1208 n. 7 (5th Cir. 1989); *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988), *reh'g denied*, 849 F.2d 1240, *cert. denied*, U.S. (1989); *Citizens For a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987).

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 18 U.S.C. § 1432 and 42 U.S.C. § 1973C. Venue is proper in this District pursuant to 28 U.S.C. § 1400(b).

2. It is settled in this Circuit that § 2 of the Voting Rights Act applies to the judiciary. *Chisom v. Roemer*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied, sub nom, Chisom v. Edwards*, 109 S.Ct. 310 (1989) (*Chisom* I). However, it is clear that at-large judicial elections may not be considered *per se* violative of § 2. Furthermore, the

Court holds that § 2 applies equally as well to State District Judicial elections as it does to appellate elections.[32]

Standard Under The Voting Rights Act

3. In *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court construed Section 2 of the Voting Rights Act, as amended, to require a three-part threshold test to demonstrate a violation of Section 2. The minority group must be able to demonstrate: that (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district ("*Gingles* 1"); (2) it is politically cohesive ("*Gingles* 2"); and (3) the white majority votes sufficiently as a bloc to enable it -in the absence of special circumstances - usually to defeat the minority's preferred candidate ("*Gingles* 3"). *Gingles*, 478 U.S. at 50-52. Failure to establish any one of the three threshold criteria is fatal to Plaintiffs' case. *Overton*, 871 F.2d at 538.

4. However, Plaintiffs do not achieve victory by satisfying the three *Gingles* factors alone. *Monroe v. City of Woodville*, No. 88-4433, slip op. at 5571, (5th Cir. Aug. 30, 1989). Instead, Plaintiffs must prove under the totality of the circumstances that as a result[33] of the challenged at large system Plaintiffs do not have an equal opportunity to

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[32] State Defendants argue that State District Judgeships cannot be analogized to legislative or appellate posts, which by nature are characterized by collegial decision making. While the Court recognizes that State District Judges function as sole, independent decision makers, the Court concludes that there is no indication that *Chisom's* extension of § 2 to judicial elections was meant to be limited to collegial judicial bodies.

[33] In *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d (1973), the Supreme Court applied what has come to be known as the "results test" indicating that a violation of § 2 could be proved by showing discriminatory *effect* alone. (Emphasis added.) Congress made clear by the 1982 amendment to § 2 that the "results test" is the relevant legal standard to be applied by this Court.

participate in the political processes and to elect candidates of their choice. *Id.* at 5571; *Gingles*, 478 U.S. at 44. The Senate Report which accompanied the 1982 amendment to § 2 specifies certain objective factors which typically may be relevant to a § 2 claim.[34] S. Rep. No. 97-417 (1982) (hereinafter S. Rep.). This list of factors is neither

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[34] Typical factors include:

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

"Additional factors that in some cases have had probative value as part of [P]laintiffs' evidence to establish a violation are:

"whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

"whether the policy underlying the state or political subdivision's use of such ... voting practice or procedure is tenuous." S.Rep. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted-in* 1982 U.S. Code Cong. Admin.News 177, 206-207.

comprehensive nor exclusive.[35] "There is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Gingles*, *supra*, at 45 [*quoting* S.Rep. at 29].

5. *Gingles*, 1 requires proof that the minority population is sufficiently large and geographically compact to constitute a majority in a single member district. *Gingles*, *supra*, at 50. To satisfy the *Gingles* 1 requirement, Plaintiffs must be able to draw a single member district in which a majority of the voting age population is minority. *Overton*, 871 F.2d at 535. Plaintiffs have satisfied this requirement with regard to all of the nine target counties at issue in this case. The minority population is sufficiently large and geographically compact to constitute a majority in at least one single member district; Black, Hispanic or combined, in each of the nine counties at issue in this case.

6. Evidence of racially polarized voting "is the linchpin of a ection 2 vote dilution claim," *Citizens For a Better Gretna v. City of Gretna*, 834 F.2d 496, 499 (5th Cir. 1987) and is relevant to establishing two of the three elements set forth in the *Gingles* decision - the minority groups political cohesiveness (*Gingles* 2) and the ability of the white majority usually to defeat the minority's preferred candidate (*Gingles* 3). *Westwego Citizens For Better Government v. Westwego*, 872 F.2d 1201, 1207 (5th Cir. 1989) [*citing Gingles*, *supra*, at 56]. These factors are usually established by statistical evidence of racially polarized voting by the voters in the relevant political unit. *Campos v. City of Baytown*, 840 F.2d 1240, 1243 (5th Cir. 1988), *reh'g denied*, 849 F.2d 1240, *cert. denied*, U.S. (1989).

7. In analyzing statistical data, the best available data for estimating the voting behavior of various groups in the electorate would come from exit polls conducted upon a random sample of voters surveyed as they leave the polling place on election day, but such evidence was not introduced

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[35] S. Rep. No. 97-417 (1982).

at trial. *See Chisom v. Roemer*, No. 86-4057, slip op. at 11 (E.D. La. Sep. 13, 1989) (*Chisom II*); Defendant-Intervenor Wood's Ex. 40. The best available data for estimating the participation of various groups in the electorate is sign-in data contained in the official records of registered voters. *Chisom II*, slip op. at 12. The best indicator of participation is obtained by dividing the number of persons who signed-in to vote by the number of persons in the voting age population. *Id.* at 12.

8. Absent an exit poll, sign-in data and voting age population data, analysts employ the bivariate ecological regression technique to estimate the voting behavior of various groups in the electorate.[36] *Id.* at 12.

9. For purposes of political cohesiveness and racially polarized voting, examining only those elections that had a minority member as a candidate, is the proper method of analysis. *Campos*, 840 F.2d at 1245. In order to show cohesion, the proper standard is the same as *Gingles*: whether the minority group together votes in a cohesive manner for the minority candidate. *Id.*[37] In counties where Plaintiffs proceed on behalf of a combined minority, if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown. Of course, if one part of the group cannot be expected to vote with or does not vote with the other part,

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[36] Like the Court in *Chisom II*, this Court is not convinced that precise correlation between the race of voters and their voting preferences can be made on the basis of the statistical analysis presented. However, no better data is provided, and the Court has given the statistical data considerable weight. *See Chisom II*, slip op. at 13.

[37] The Court in *Campos* rejected the City of Baytown's argument that in order to show cohesion when there are two minorities that make up the minority group, Plaintiffs must show first that Blacks are cohesive, next, that Hispanics are cohesive and finally, that Blacks and Hispanics together are cohesive. *Campos*, 840 F.2d at 1245.

the combination is not cohesive. *Id.*

10. In evaluating the statistics necessary for Plaintiffs to prove racial bloc voting, this Court is bound by recent Fifth Circuit authority to consider statistical evidence from judicial elections and from exogenous elections.[38]

11. This Court is satisfied that the statistics relating to exogenous elections in the present case qualify as a sufficiently "local appraisal" to establish some degree of racial bloc voting.

12. This Court concludes under the controlling law that the statistical evidence furnished by the expert witnesses for Plaintiffs and Plaintiff-Intervenors to be legally competent and highly probative. *Gingles*, 478 U.S. at 52-54; *Overton*, 871 F.2d at 537-540.[39]

13. The final determination, however, must be made by an evaluation of the "totality of the circumstances," including the factors listed in the Senate Report. *Westwego*, 872 F.2d at 1206. The Court must determine, on the basis of a "searching, practical evaluation," of past and present reality whether the political process is open to minority voters. *Gingles*, 478 U.S. at 45 [*quoting* S.Rep. at 30, U.S.Code Cong. & Admin.News 1982, p. 208]. Such a determination is dependent on the facts of each case and requires "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 [*quoting Rodgers v. Lodge*, 458 U.S. 613, 102 S.Ct.

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[38] *See Chisom II*, slip op. at 40; *Citizens for a Better Gretna*, 834 F.2d at 499. "Exogenous" elections are those which overlap the boundaries of the relevant unit. "Exogenous" elections are contrasted with "indigenous" elections which involve only the geographic unit at issue. *Westwego*, 872 F.2d at 1206, n. 10. County-wide elections represent the relevant geographic unit in the present case.

[39] Unlike the statistical analysis in *Overton*, Plaintiff and Plaintiff-Intervenors' experts in the present case established confidence levels of statistical significance and used consistent measures of minority voting strength. *Overton*, 871 F.2d at 537-540.

3272, 73 L.Ed.2d 1012 (1982)]. The appraisal in this case must be conducted on a district-by-district basis. *Gingles*, *supra*, at 59 n. 28 (the inquiry into the existence of vote dilution is district-specific).

14. This Court recognizes that judicial elections are characterized by less voter interest than high profile candidates receive at the top of the ticket. However, under the controlling law, party affiliation, straight party ticket voting and campaign factors do not constitute legally competent evidence in the present case. This Court rejects the State Defendants' argument that there can be no "functional view of the political process" without taking into account political party as the principal factor affecting such races. The Supreme Court in *Gingles* made clear that it is the difference between choices made by blacks and whites alone and not the reasons why they vote differently that is the central inquiry of § 2. *Gingles*, 478 U.S. 61-62.

15. Congress and the Courts have recognized that "political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." *Gingles*, 478 U.S. at 69. Congress clearly concluded that provisions such as majority vote requirements, designated posts, and prohibitions against bullet voting could serve to further dilute the voting strength of minorities. *Id.* at 56; *Jones v. City of Lubbock*, 727 F.2d at 383 (finding that majority vote requirement further submerges political minorities).

16. This Court concludes that under the relevant law the at-large system for election State District Judges in the nine target counties interacts with social and historical conditions to cause an inequality in the opportunity enjoyed by black and white voters to elect their preferred candidates. *Gingles*, 478 U.S. at 47.

17. Defendants' lead expert, Dr. Taebel reviewed many selection contests which the Fifth Circuit determined are not germane to Voter Dilution Cases. Dr. Taebel analyzed races in which Anglos opposed Anglos. *Campos v.*

City of Baytown, 840 F.2d 1240, 1245 (5th Cir. 1988). Dr. Taebel also reviewed non-judicial elections.

18. Costly reorganization of the State at-large system of general and specialized Courts and disruption of County administrative duties such as jury selection are not sufficient grounds for maintaining an otherwise flawed system. *Westwego*, 872 F.2d at 1211 [*in reliance on Dillard v. Crenshaw County*, 831 F.2d 246, 250-51 (11th Cir. 1986)].

19. Congress did not contemplate that such considerations would play a role in determining whether there has been a violation of section 2. *Id.* at 1210-11.

20. On the strength of the evidence of racially polarized voting in the context of the "totality of the circumstances" test and considering the substantial evidence presented by Defendants to the contrary, this Court concludes that Plaintiffs have demonstrated a violation of § 2 of the Voting Rights Act in each of the nine counties in question. *Westwego*, 872 F.2d at 1203 & 1209.

Fourteenth and Fifteenth Amendment Claims

21. Proof of racially discriminatory intent or purpose is required to show a violation under either the Fourteenth or Fifteenth Amendment to the United States Constitution. *Chisom II*, *supra*, at 41 [*citing*: *Kirksey v. City of Jackson, Miss.*, 663 F.2d 659 (5th Cir. 1981); *Washington v. Davis*, 426 U.S. 229, 239-41 1976)].

22. Proving racial discrimination as the motivating factor in a state legislative body "is often a problematic undertaking." *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985). Proof must be presented that the legislative body as a whole possessed the intent to discriminate. *Id.* at 229-32. It is impossible to conceive that four leading minority members of the State Senate would vote to send an individiously discriminatory measure affecting the entire state to the voters with their own seal of approval on it.

23. Plaintiffs and Plaintiff-Intervenors failed to prove, as a matter of law, that the present at large system for electing State District Judges in the State of Texas was

instituted with the specific intent to dilute, minimize or cancel the voting strength of Black and/or Hispanic voters. Accordingly, the Court is of the opinion that the following Orders are appropriate:-

IT IS ORDERED that the present at-large system of electing State District Judges in the counties of Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland violates Plaintiffs' civil rights by unconstitutionally diluting the voting strength of Hispanic and Black electors in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 (West Supp. 1989).

IT IS FURTHER ORDERED that Plaintiffs and Plaintiff-Intervenors request to Permanently Enjoin the State of Texas from calling, holding, supervising or certifying any future elections for State District Judges under the present at large scheme in the target areas is taken under advisement. The Court recognizes the possibility that corrective relief may be available at a later date before future elections for State District Judges take place. *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988).

The Court is hopeful that Governor Clements will include the issue of an alternative State District court election scheme as part of his call of the Special Legislative Session on November 13, 1989. Depending on the progress that is made in the Legislature, if any, prior to January 3, 1990, the Court will thereafter entertain a Restraining Order or Motion to Enjoin future State District Court elections pending the Remedy Phase of this litigation.

IT IS FURTHER ORDERED that the issues of Costs of Court and attorneys fees are expressly reserved until the conclusion of this litigation.

Chief Judge Charles Evans Hughes, in 1936, in an address to the American Law Institute, said:

> How amazing it is that, in the midst of controversies on every conceivable subject, one should expect unanimity of opinion upon difficult legal questions! In the highest ranges of thought, in theology, philosophy and science, we find differences of view

on the [illegible] of the most distinguished experts -- theologians, philosophers, and scientists. The history of scholarship is a record of disagreements. And when we deal with questions dealing with principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty.

This area of the law is not a sphere of icy certainty. Should the Legislature fail to adopt a satisfactory Remedy in the Special Session (provided Governor Clements includes this matter in his call) this Court will consider the granting of an expedited appeal to the Fifth Circuit to determine whether or not the Declaratory Judgment of this Court was properly made.

SIGNED AND ENTERED this 8th day of November, 1980.

s/s
Lucius D. Bunton
Chief Judge

No. 93-630

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In The

Supreme Court of the United States

October Term, 1993

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, COUNCIL NO. 4434, *et al.*,

Petitioners,

v.

WILLIAM P. CLEMENTS, GOVERNOR OF THE STATE OF TEXAS, *ET AL.*,

Respondents.

On Petition for Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENT-INTERVENOR HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fifth Circuit's *en banc* decision below correctly follow the instruction of this Court on remand that it evaluate the State of Texas' interest in linking the jurisdiction and elective base of district judges to determine whether vote dilution may be proved or remedied under the totality of the circumstances?

2. Should the Court grant certiorari to resolve a conflict between the *en banc* Fifth Circuit ruling in this case and a subsequent panel decision of the Eleventh Circuit in *Nipper v. Smith*, 1 F.3d 1171 (1993), which conflicts internally with decisions in its own Circuit and with *Thornburg v. Gingles*, 478 U.S. 30 (1986)?

3-4. Given the Fifth Circuit's holding that Texas' state district judge election system does not violate § 2 of the Voting Rights Act, should the Court grant certiorari to review the Court's refusal to accede to the Plaintiffs' and Texas Attorney General Morales' demand that, instead of ruling on the merits, the Fifth Circuit should have remanded this case to the district court to implement their "settlement," which would have replaced Texas' constitutionally required judicial election system with the Plaintiffs' subdistricting plan without a finding of violation of federal law?

LIST OF PARTIES

The participants in the proceedings below were:

Plaintiffs:

LULAC Local Council 4434

LULAC Local Council 4451

LULAC (Statewide)

Christina Moreno

Aquilla Watson

Joan Ervin

Matthew W. Plummer, Sr.

Jim Conley

Volma Overton

Willard Pen Conat

Gene Collins

Al Price

Theodore M. Hogrobrooks

Ernest M. Deckard

Judge Mary Ellen Hicks

Rev. James Thomas

Plaintiff-Intervenors:

Houston Lawyers' Association

Alice Bonner

LIST OF PARTIES – Continued

Weldon Berry

Francis Williams

Rev. William Lawson

DeLoyd T. Parker

Bennie McGinty

Jesse Oliver

Fred Tinsley

Joan Winn White

Defendants:

Dan Morales, Attorney General of Texas

John Hannah, Secretary of State of Texas

Texas Judicial Districts Board

Thomas R. Phillips, Chief Justice, Texas Supreme Court

Mike J. McCormick, Presiding Judge, Court of Criminal Appeals

Pat McDowell, Presiding Judge, 1st Administrative Judicial Region

Thomas J. Stovall, Jr., Presiding Judge, 2nd Administrative Judicial Region

B. B. Schraub, Presiding Judge, 3rd Administrative Judicial Region

Olin Strauss, Presiding Judge, 4th Administrative Judicial Region

LIST OF PARTIES – Continued

Darrell Hester, Presiding Judge, 5th Administrative Judicial Region

William E. Moody, Presiding Judge, 6th Administrative Judicial Region

Weldon Kirk, Presiding Judge, 7th Administrative Judicial Region

Clyde R. Ashworth, Presiding Judge, 8th Administrative Judicial Region

Ray D. Anderson, Presiding Judge, 9th Administrative Judicial Region

Joe Spurlock II, President, Texas Judicial Council

Leonard E. Davis

Defendant-Intervenors

Judge Sharolyn Wood

Judge Harold Entz

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No. 93-630

In The

Supreme Court of the United States

October Term, 1993

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, COUNCIL NO. 4434, *et al.*,

Petitioners,

v.

WILLIAM P. CLEMENTS, GOVERNOR OF THE STATE OF TEXAS, *ET AL.*,

Respondents.

On Petition for Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENT-INTERVENOR HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent/Intervenor Harris County District Judge Sharolyn Wood ("Judge Wood") respectfully opposes the Petition for Writ of Certiorari filed in this case because the Fifth Circuit Court of Appeals correctly followed controlling law in holding, *en banc*, that Texas' county-wide system for electing state district judges does not violate § 2 of the Voting Rights Act.

OPINIONS AND JUDGMENT BELOW

This case was decided below on remand from this Court of *Houston Lawyers' Association ("HLA") v. Attorney General of Texas*, ___ U.S. ___, 111 S. Ct. 2379 (1991). Judge Wood incorporates by reference Petitioner League of United Latin American Citizens ("LULAC") *et al.*'s (collectively "Plaintiffs'") statement of opinions and judgments below.

JURISDICTION

Judge Wood incorporates by reference LULAC's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves § 2 of the Voting Rights Act, 42 U.S.C. § 1973, set out at Pet. 2-3; U.S. Const., amends. X, XIV and XV; and §§ 7 and 7(a)(i) of the Texas Const. of 1876, set forth in Appendix B, attached to Judge Wood's Cross-Petition for Writ of Certiorari ("App. B") at 3b-5b.

STATEMENT OF THE CASE

The Proceedings Below

This case is accurately stated in the Fifth Circuit's *en banc* opinion, App. 1a-9a. Judge Wood adopts that statement with the addendum that, while this Court reversed the prior *en banc* majority opinion of the Fifth Circuit

which had held that § 2 does not apply to judicial elections, *HLA v. Attorney General*, 111 S. Ct. 2379, the Court also recognized that Texas has a special interest in linking the electoral and jurisdictional bases of state district judges, a view which had been advanced in a concurring opinion of the Court of Appeals written by Judge Higginbotham. 111 S. Ct. at 2379. This Court disagreed that a strong state interest in linking jurisdiction and electoral base necessarily precludes a § 2 challenge, but held that the weight of the state's interest must be evaluated as part of the totality of the circumstances. 111 S. Ct. at 2380-81. It remanded this case to the Fifth Circuit with specific instructions to evaluate the concerns expressed by Judge Higginbotham to determine whether vote dilution "may be found or remedied" under the totality of the circumstances. 111 S. Ct. at 2380-81.

The case was rebriefed and heard by the original three-judge panel. Fifteen months later, a two-judge majority of that panel affirmed the trial court's finding of illegal vote dilution in eight of the nine target counties over the vigorous dissent of Judge Higginbotham. Within a matter of days, the Fifth Circuit vacated the panel majority opinion *sua sponte* and ordered *en banc* review.

When the panel opinion was vacated, Attorney General Morales (a named Defendant and counsel for the State of Texas) and the Plaintiffs launched a massive media and legislative campaign in which Attorney General Morales claimed that his duty required him to "defend" the Voting Rights Act against Texas law and to replace Texas' county-wide judicial election system with the Plaintiffs' plan – a plan that would have subdivided Texas judicial districts and assigned state district judges

to state legislative districts in violation of the Texas Constitution and an entire body of Texas statutory law.[1] *See* App. at 7a-8a.

Attorney General Morales and the Plaintiffs filed their plan as a "resolution" in the Texas legislature, with the avowed intention of mooting this lawsuit, falsely representing in the preamble that subdistricting was necessary to bring Texas law into compliance with federal law. App. at 7a-8a. The "resolution" failed to receive approval of the Texas legislature. App. at 7a-8a. Attorney General Morales and the Plaintiffs also presented their "settlement" to *non-party* Texas Democratic officials for signature, but withheld it from the named state officials and Defendant-Intervenors, Judges Wood and Entz, who were *parties* to the suit. App. at 7a-8a. They then filed their plan as a "settlement" in the Fifth Circuit Court of Appeals, seeking remand to the district court for implementation instead of determination of the merits of the Plaintiffs' § 2 claims.

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[1] As originally promulgated, the plan would have assigned two judges to every Democratic legislator and one to every Republican legislator in Harris County. The Plaintiffs and Attorney General Morales subsequently changed their plan so that one judge would be assigned to each legislator and the left-over judges – intentionally including Judges Wood and Entz – would run at large. *See* App. at 8a. They avowed that in this way they could deprive Judges Wood and Entz of standing to challenge their "settlement" since they would still be elected at large. App. at 8a; Pet. at 24 n.16. The Fifth Circuit rejected this claim and held that Judges Wood and Entz were not deprived of standing to pursue the defense of this case. App. at 18a n.12, 19a, 21a.

The Defendant-Intervenors moved to realign Attorney General Morales with the Plaintiffs and to allow the Defendant-Intervenors to assume the State's defense of the case. App. at 8a-9a. Judge Wood also moved to disqualify Morales as counsel for the State on a number of federal and state constitutional grounds and state statutory grounds. App. at 9a. Judges Wood and Entz were supported by three former Chief Justices of the Texas Supreme Court (both Democrat and Republican) as amici. App. at 8a. Sitting Chief Justice Phillips of the Texas Supreme Court, a named Defendant, sought and was granted independent representation on the ground that the Texas Attorney General refused to represent him. App. at 9a. He opposed the "settlement." Attorney General Morales moved to disqualify the Chief Justice's counsel, a motion which the Fifth Circuit denied. App. at 9a.

On August 23, 1993, following oral argument which concentrated on both the merits of the Plaintiffs' § 2 claim and the authority of the Texas Attorney General to change state laws of general application by way of "settlement" without a proven violation of law and in violation of many federal and state constitutional and statutory laws, the *en banc* Court, in a 9 to 4 opinion, held that Texas' county-wide judicial election system did not violate § 2 in any of the target counties. App. at 86a. The Court held, "one thread runs throughout the Plaintiffs' case in all of the counties – an *insubstantiality of proof* that the minority preferred candidate lost on account of race." App. at 87a (emphasis added).

The *en banc* Court denied the Plaintiffs' and Texas Attorney General's request to remand for implementation of their "settlement." App. at 21a-28a. It also denied

Attorney General Morales' motion to disqualify Chief Justice Phillips' counsel and the Plaintiffs' post-hearing motion to nonsuit the non-compliant Texas officials. App. at 17a. It denied Judges Wood's and Entz's motions to realign but reserved the right to reconsider "if the Attorney General changes his views on the merits of the case." App. at 17a.[2] It denied Judge Wood's motion to disqualify. App. at 18a. Judge Wood has filed a cross-petition for writ of certiorari on the Fifth Circuit's denial of her motions to realign and disqualify.

Statement of Facts

Judge Wood adopts LULAC's statement of facts with the following additions and clarifications:

First, while including statistical tables purporting to show a proportional short-fall of minority judges from total minority population in the target counties, the Plaintiffs omit from their statement of facts unchallenged evidence that the percentage of minority judges exceeds the eligible constitutionally qualified judicial applicant pool (*e.g.*, 3.8% of all attorneys in Harris County were black at the time of trial versus 5.1% of all Harris County district judges, App. at 318a).

Second, and more importantly, the Plaintiffs misstate the degree of interest the State of Texas takes in ensuring

---

[2] Attorney General Morales had filed briefs prior to the three-judge panel hearing on remand supporting the State's "compelling interest" in its county-wide judicial election system as a "fundamental right," *see* App. at 76a, a position he later publicly disavowed.

that its state district judges are elected by – and accountable to – *all* of the people over whom they have primary jurisdiction. The Plaintiffs allege that Texas district courts are created by statute. Pet. at 9. *Specific* district courts are indeed created by statute, but Texas' county-wide judicial election system is prescribed by Article 5 § 7 of the Texas Constitution, and the manner of creating new district courts is prescribed by Article 5 § 7a. App. B at 4b-5b. Plaintiffs then assert that state district court jurisdiction is statewide. Pet. at 10. This statement is incorrect and misleading. The *en banc* Court explored in detail the errors in the Plaintiffs' claims that Texas does not *really* insist on linking jurisdiction and electoral district. App. at 79a-83a.

Essentially, Texas has numerous constitutional and statutory safeguards which ensure that judges exercise primary jurisdiction only within the county from which they are elected and that only the judges elected by all of the citizens of that county have such jurisdiction. App. at 4a-5a, 70a, 76a-83a. In its *en banc* opinion, the Fifth Circuit pointed out that "[b]y making coterminous the electoral and jurisdictional bases of trial courts, Texas advances the effectiveness of its courts by balancing the virtues of accountability with the need for independence," and it "attempts to maintain the fact and appearance of judicial fairness that are central to the judicial task, in part, by insuring that judges remain accountable to the range of people within their jurisdiction." App. at 70a. Thus to state (as the Plaintiffs do) that district courts are "statutory" and that their jurisdiction is "statewide" serves to denigrate and distort the fundamental structure, purpose,

importance and history of Texas' county-wide district judge election system.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT'S *EN BANC* DECISION CORRECTLY FOLLOWS THE MANDATE OF THIS COURT IN *HLA V. ATTORNEY GENERAL OF TEXAS* AND APPLICABLE PRECEDENT.

The Fifth Circuit's *en banc* decision on remand followed exactly the instructions of this Court. In *HLA v. Attorney General of Texas*, this Court, while reversing the *en banc* majority holding that state district judges are not "representatives" within the meaning of § 2, specifically addressed the concurrence, stating,

> In a separate opinion, portions of which were joined by five other judges, Judge Higginbotham expressed his disagreement with the majority's conclusion that judges are not "representatives" within the meaning of the [Voting Rights] Act, but concurred in the judgment of reversal. His opinion relied on a distinction between state appellate judges and trial judges. . . . [T]he Texas trial judge has jurisdiction that is coextensive with the geographic area from which he or she is elected and has the sole authority to render final decisions. Judge Higginbotham's opinion characterized trial judges "as single-office holders instead of members of a multi-member body," 914 F.2d, at 649 (concurring opinion), because each exercises his or her authority independently of the other judges

> serving in the same area or on the same court. Given the State's "compelling interest in linking jurisdiction and elective base for judges acting alone," Id., at 651, and the risk that "attempting to break the linkage of jurisdiction and elective base . . . may well lessen minority influence instead of increase it," Id., at 649, by making only a few district court judges principally accountable to the minority electorate rather than making all of the district's judges partly accountable to minority voters, he concluded that elections for single-member offices, including elections for Texas district court judgeships, are exempt from vote dilution challenges under § 2.

HLA v. Attorney General, 111 S. Ct. at 2379.

The Court remanded this case to the Fifth Circuit with instructions to evaluate the concerns expressed by Judge Higginbotham under the totality of the circumstances, stating,

> [W]e believe that the State's interest in maintaining an electoral system – in this case, Texas' interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters – is a legitimate factor to be considered by courts among the "totality of circumstances" in determining whether a § 2 violation has occurred. A State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry, and the Fifth Circuit has expressly approved the use of this particular factor in the balance of considerations. See *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (CA5 1973), *aff'd sub nom. East*

Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 96 S. Ct. 1083 47 L. Ed. 2d 296 (1976).

Houston Lawyers', 111 S. Ct. at 2380-81.[3]

The *en banc* Court did exactly as this Court instructed. In a 147 page opinion, the Court first addressed the Plaintiffs' and Attorney General Morales' attempt to "settle" this case – a critical issue which arose on remand calling into serious question the efficacy of the defense of this case. App. at 9a-32a. Second, the Court addressed the standard of proof of racial bloc voting as established by *Whitcomb v. Chavis*, 403 U.S. 755 (1971) and *White v. Regester*, 412 U.S. 755 (1973), the cases from which the results test is derived,[4] the 1982 amendments to the Voting Rights Act, and *Thornburg v. Gingles*, 478 U.S. 30. App. at 28a-58a. Third, the Court addressed other legal errors affecting the trial court's vote dilution inquiry. App. at 59a-68a. Fourth, the Court addressed Texas' interest in linking jurisdiction and electoral district, in relation to the "totality of the circumstances," the

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[3] The passage from *Zimmer* referenced by the Court states,

> Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a *strong state policy divorced from the maintenance of racial discrimination*, *Whitcomb v. Chavis*, 403 U.S. 755 (1971), would require a holding of no dilution.

Zimmer, 485 F.2d at 1305 (emphasis added).

[4] *See* S. Rep. 97-417, *reprinted in* 1982 U.S. Cong. & Admin. News, 192.

specific issue this Court asked it to address. App. at 69a-86a. Finally, it addressed the evidence regarding each target county, finding insubstantial proof of vote dilution in each. App. at 86a-120a.

The Plaintiffs' claim that the Fifth Circuit's *en banc* opinion "refused to apply *Gingles* to this case" and refused to follow this Court's instructions on remand is simply not true. *See* Pet. at 15. The Fifth Circuit's task, as it saw it, was to correct "[s]ignificant legal errors" in the trial court's judgment "including its refusal to consider the effect of partisan voting, its finding of liability in Travis County now undefended, its selective aggregation of language and ethnic minorities, its refusal to accord weight to the State's linkage interest in the totality of the circumstances, and finally, its heavy reliance upon historical societal discrimination without bringing this history home to this case." App. at 25a. The Court concluded, "We cannot escape this error-correcting task – and when it is done, there is no case." *Id.*

Citing to this Court's instruction to determine on remand whether the weight of Texas' interests in linking jurisdiction and electoral district "outweigh proof of racial vote dilution," App. at 75a (quoting 111 S. Ct. at 2381), the *en banc* Court concluded that the weight of Texas' interest was assigned by *Gregory v. Ashcroft*, ___ U.S. ___, 111 S. Ct. 2395 (1991), decided the same day as *HLA v. Attorney General*. App. at 91a. Specifically, since "the authority of the people to determine the qualifications of their most important government officials . . . lies at the heart of representative government..[,] the States' power to define the qualifications of their office-holders

has force even as against the proscriptions of the Fourteenth Amendment." App. at 76a (quoting *Gregory*, 111 S. Ct. at 2402, 2405). Thus *Gregory* requires a clear statement from Congress to permit a federal statute to override State qualifications for important State offices. App. at 76a.

Following *Gregory*, the Fifth Circuit held that Texans "have at least a substantial interest in defining the structure and qualifications of their judiciary," and that "[l]inking electoral and jurisdictional bases is a key component of the effort to define the office of district judge." App. at 76a. The Court further held that there was no evidence that the linkage between jurisdiction and the electoral base of Texas district judges was "created and consistently maintained to stifle minority votes" and that breaking that linkage "would perversely lessen minority influence on the conduct of most litigation," App. at 78a. Having held that Texas' interest in its county-wide judicial election system was substantial, the Court further held that "plaintiffs cannot overcome a substantial state interest by proving insubstantial dilution." App. at 86a. The Court then examined each target county in turn and held that the evidence of vote dilution was "insubstantial" in each and, therefore, "under controlling law, the evidence will not support the findings of liability." *Id.*

The Plaintiffs' contention that the Fifth Circuit should have reviewed the judgment of the trial court on a "clearly erroneous" basis but that, instead, it "ignored the findings of the district court" and "made its own factual findings with regard to the State's interest and declared that these were matters of law to be determined *de novo* by the appellate court," Pet. at 18, entirely misses the point and fails to show any reason why certiorari should be granted.

II.

THERE IS NO LEGALLY SIGNIFICANT CONFLICT BETWEEN THE CIRCUITS.

The Plaintiffs claim that the Fifth Circuit's *en banc* ruling generates a conflict with the Eleventh Circuit. Pet. at 19. This is incorrect. *After* this case was decided by the Fifth Circuit, a panel of the Eleventh Circuit chose to ignore *both* the *en banc* decision in this case *and* previous precedent within its own circuit in order to create a result which conflicts with both, as well as with overwhelming Supreme Court and legislative authority and the plain language of § 2 itself. *Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1990).

Specifically, in *Nipper*, Senior District Judge Atkins, sitting by designation on the Eleventh Circuit Court of Appeals, held that plaintiffs can establish a § 2 violation simply by proving the threshold *Gingles* factors, which, in turn, requires only statistical proof of divergence between black and white voting patterns, *i.e.*, proof of "racial polarization." *See Id.* at 1182. Other factors – such as the *Zimmer* factors approved by this Court in *Gingles* – are relevant only "to the extent that they are supportive of the three core *Gingles* factors, however, they need not be present to satisfy the *Gingles* test." *Id.* at 1178.

The *Nipper* court also drew a number of subordinate legal conclusions necessary to support its finding of illegal vote dilution in Florida judicial races, including the conclusions (1) that the district court's decision to discount the probative value of six races that took place between 1972 and 1984 as "stale" was incorrect, 1 F.3d 1178; (2) that courts can simply assume that if no blacks

have run for office in the recent past (as they had not in the challenged districts) the reason is discrimination, *id.*; (3) that the election of white candidates supported by blacks is no evidence of lack of dilution, *id.* at 1179-80; (4) that actual local factors affecting judicial races, such as incumbency, can be used to explain minority candidates' success "despite white bloc voting" but not to explain their lack of success, *id.* at 1181; and (5) that a comparison of the number of minority judges to the *eligible* minority population "is not responsive to the question of whether the Florida judiciary adequately reflects the racial and ethnic diversity of the citizens of Florida," but instead, the question is "whether the number of minority judges reflects proportionately the number of minorities of the general population." *Id.* at 1183 and 1182 n.10.

Nipper is indeed at odds with the Fifth Circuit's painstaking analysis of the standard of proof of illegal vote dilution as applied to Texas judicial elections. The *Nipper* court itself, however, recognized the internal division within its own Eleventh Circuit regarding the issues whether vote dilution can be proved simply by proof of racially polarized voting and whether defendants can raise a defense under the totality of the circumstances. *Nipper*, 1 F.3d at 1178 n.11 and 1182 (citing *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990) and *Hall v. Holder*, 955 F.2d 1563, 1528 n.9 (11th Cir. 1992)). Even more significantly, the *Nipper* opinion contradicts the wording of § 2 itself, which proclaims that it does *not* establish a right to proportional representation, 42 U.S.C. § 1973(b), and it contradicts *Gingles*, which holds,

> First, . . . Plaintiffs must demonstrate that, under the totality of the circumstances, the devices

> result in unequal access to the electoral process. *Id.*, at 16. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. *Ibid.* Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it. *Id.*, at 33.

Gingles, 478 U.S. at 46, 106 S. Ct. at 2764.

Judge Wood suggests that Supreme Court review is unnecessary to determine whether this case or *Nipper* is right. As a panel opinion that ignores and contradicts not only binding precedent in its own circuit but all precedent outside it, including the face of § 2 itself and controlling law as established by this Court, *Nipper* is an aberrant case that should be resolved by the Eleventh Circuit, not by this Court.

III.

THE FIFTH CIRCUIT CORRECTLY HELD THAT REMAND FOR CONSIDERATION OF PLAINTIFFS' SETTLEMENT WAS NOT APPROPRIATE.

The third and fourth issues the Plaintiffs raise as questions for certiorari – essentially whether the Fifth Circuit should have remanded their and Attorney General Morales' "settlement" for implementation – are moot in light of the Fifth Circuit's *en banc* holding that Texas' district judge election system does not violate § 2.

If this Court grants certiorari on any issue, it should grant it on the merits, not on the Fifth Circuit's proper refusal to remand a case for "settlement" where there is no violation of law. *See* App. at 18a-28a. Only a violation

of federal law would trigger the Supremacy Clause to permit alteration of Texas law without compliance with Texas' requirements, and the Fifth Circuit has held there is no such violation. Nor could any ruling of this Court place the parties in the *status quo ante*. Therefore, certiorari should be denied on this issue.

In the interests of equity, however, if this Court should grant certiorari on any issue going to the merits of this case, the Court should also grant Judge Wood's cross-petition for certiorari on the issue of the realignment and disqualification of the Texas Attorney General. As elaborated in the Fifth Circuit's *en banc* decision, Texas Attorney General Morales and the Plaintiffs made a bold grab for political power, entirely outside all law and authority, attempting to impose their political preference for judicial subdistricts on Texas by "settling" this case instead of complying with Texas' time-honored methods for amending its Constitution and laws. App. at 10a-28a. Their "settlement" failed to win approval from the Texas legislature and was, of course, never submitted to the Texas voters as required for any change of the Texas Constitution. The Fifth Circuit, in its turn, refused to order a rubber-stamp remand so that the Plaintiffs and the Attorney General could implement their "settlement." App. at 18a-28a.

The Fifth Circuit cited sound authority for refusing to permit Attorney General Morales' and the Plaintiffs' end-run around the law and for permitting the Defendant-Intervenors to carry forward the State's defense, given the Attorney General's refusal to do so. Authorities circumscribing the Texas Attorney General's power include *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (*en banc*);

Terrazas v. Ramirez, 829 S.W.2d 712 (Tex. 1991); *Public Utility Commission of Texas v. Cofer*, 754 S.W.2d 232, 235 (Tex. 1988). Authorities setting limits on consent decrees that affect matters of public interest and curtail the rights of others, including intervenors, include *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932); and *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir. 1981).

Judge Wood's only disagreement with the Fifth Circuit's rulings on Attorney General Morales' activities in this case is its refusal at this time to realign Attorney General Morales personally as a Plaintiff, given his disavowal of his own briefs at oral argument and his public repudiation of the defense of this case, and to disqualify him as counsel for the defense.

Judge Wood has filed herewith a cross-petition for writ of certiorari on the ground that the Fifth Circuit's refusal to realign the Texas Attorney General as a party and to disqualify him and his staff as counsel for the State of Texas conflicts with prior decisions of the Fifth Circuit itself and applicable decisions of the Texas Supreme Court and of this Court and raises important questions of federal law which should be decided by this Court.

If this Court grants certiorari and hears oral argument on the merits of this case, the State of Texas will have no defender, since the Court does not permit shared oral argument, and the Texas Attorney General has made his refusal to defend Texas law abundantly clear. The Court should therefore grant Judge Wood's cross-petition and allow Judge Wood to carry forward the defense of

the State of Texas on any issues on which the Court grants certiorari.

CONCLUSION

For the foregoing reasons, Respondent Harris County District Judge Sharolyn Wood requests (1) that the Court deny Plaintiffs LULAC *et al.*'s petition for writ of certiorari or (2), in the alternative, if it grants certiorari, that it also grant her cross-petition for writ of certiorari, realign Texas Attorney General Morales as a Plaintiff and disqualify him and his staff as counsel for the defense, and affirm the opinion and judgment of the *en banc* Fifth Circuit Court of Appeals on the merits.

Respectfully submitted,

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No. 93-630

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LEAGUE OF UNITED LATIN AMERICAN CITIZENS COUNCIL NO. 4434, *et al.*,

Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *etc., et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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November 24, 1993

QUESTIONS PRESENTED

1. In cases brought under the results test of Section 2 of the Voting Rights Act of 1965, as amended, involving judicial elections, what are the standards for measuring whether the challenged electoral system violates the Act?

2. Whether the Court should exercise its supervisory power to correct the Fifth Circuit's error in refusing to grant a joint motion by the plaintiffs and the state to remand the case to the district court for consideration and effectuation of a settlement approved by the Governor, the Attorney General, the Secretary of State, the Lieutenant Governor, the Speaker of the House, and a majority of both houses of the Texas Legislature, but opposed by one of fifteen official-capacity state defendants and two personal-capacity defendant-intervenors?

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COUNCIL NO. 4434, *et al.*,

Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *etc.*, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

This memorandum is filed in response to the petition for writ of certiorari filed by twenty-five petitioners, led by the League of United Latin American Citizens Council No. 4434. Hereinafter, they collectively will be termed "LULAC."

The Attorney General of Texas files this memorandum on behalf of the fifteen state respondents who are in this case only in their official capacities. Hereinafter, both for simplicity and because of the rifts explained in the following paragraph, the state respondents collectively will be termed the "state."

The fifteen official-capacity state respondents are: (i) the Attorney General; (ii) the Secretary of State of Texas; and (iii) the thirteen-member Judicial Districts Board of Texas, chaired by the Chief Justice of the Supreme Court of Texas. These state respondents have varying opinions on the proper disposition of this case, and one of them -- the Chief Justice -- retained private counsel to represent his views on settlement to the Fifth Circuit sitting en banc. Inasmuch as the Attorney General perceives his state constitutional duties to require presentation of a unified position for the state under these circumstances, he files this brief on behalf of the state in his capacity as the state's chief legal officer.

OPINIONS BELOW

LULAC's Appendix omits four district court orders modifying the liability determination the court made in the Memorandum Opinion and Order of November 8, 1989. LULAC App. 487a-549a. It also omits the district court's two orders on remedy. The omitted orders constitute the appendix to this memorandum.

STATEMENT OF THE CASE

This case was filed in 1988 and tried to the court in the fall of 1989. Two months later, the district court issued its liability decision, finding violations of section 2 of the Voting Rights Act, as amended, in each of the nine urban counties[1] targeted in the suit, but finding no intentional discrimination and, consequently, no constitutional violation. LULAC App. 487a-549a; State App. 1a-7a. Subject to the challenge at the time of trial

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[1] A tenth county is incidentally implicated because it is combined with one of the nine targeted counties to form one of the challenged judicial districts.

were 172 state district court seats (or judicial districts), constituting 45% of the state's total.

In early January of 1990, the district court issued orders on remedy, directing that the 1990 round of judicial elections for the 115 state district court seats up for election be conducted on a non-partisan basis using a system of subdistricts instead of on a partisan basis using countywide judicial districts. State App. 8a-21a. The Fifth Circuit immediately stayed implementation of the interim remedy.

On the first round of appeals, a panel of the Fifth Circuit split two-to-one and held that Texas trial judges as solo decisionmakers were not subject to the effects prong of amended section 2 of the Voting Rights Act. 902 F.2d 293. Taking the case en banc sua sponte, the full Fifth Circuit then held that the effects prong of the amended section 2 did not cover any judicial elections. 914 F.2d 520. There was a five-member concurrence adopting the panel's rationale, a special concurrence by the Chief Judge, and a solo dissent. This Court then reversed, holding that the decision in *Chisom v. Roemer*, 111 S.Ct. 2354 (1991), that amended section 2 covered judicial elections also applies to district court elections. *Houston Lawyers' Association v. Attorney General of Texas*, 111 S.Ct. 2376 (1991).

On remand, the original Fifth Circuit panel again split two-to-one. This time, it upheld the district court's liability determination in eight of the nine targeted counties (reversing the liability finding only in Travis County). 986 F.2d 728; LULAC App. 203a-486a. The Fifth Circuit again took the case en banc sua sponte. LULAC App. 486a.

Following the second panel opinion, and between the en banc order and the en banc argument on May 24,

1993, the state and LULAC reached an accord on the merits of the case. In addition to the Attorney General and Secretary of State (who are official-capacity parties), the state's signatories were the Governor, the Lieutenant Governor, and the Speaker of the House. The Texas Legislature followed with majority approval of the accord through a resolution of the state House of Representatives and through a resolution approved by the state Senate sitting as the Committee of the Whole.

Two weeks or so before en banc argument, the state and LULAC filed a joint motion to remand the case to the district court for a fairness hearing on whether the settlement should be approved, modified, or rejected. The settlement would create a subdistricting electoral system in the nine targeted counties, with some countywide district court elections retained in six of the counties, including the two largest, Dallas and Harris.

Two incumbent district court judges -- one from Dallas County and one from Harris County -- who had intervened as defendants only in their personal capacities, and whose seats were unaffected by the settlement, opposed the settlement and the joint motion to remand for a hearing on its effectuation. The state's Chief Justice, who was in the suit only in his official capacity as chair of the Judicial Districts Board, also argued separately against the settlement and the remand motion.

In late August of 1993, the Fifth Circuit, by a 9-4 vote, denied the joint remand motion, bifurcated the state's representation by permitting independent counsel for the Chief Justice, and reversed the district court by finding no section 2 violations in any of the nine targeted counties. 999 F.2d 831; LULAC App. 1a-202a.

Without ever explicitly saying so, the Fifth Circuit

rejected the argument that the state was the real defendant-party in interest. Instead, it determined that: (i) the Chief Justice's role as both chair of the Judicial Districts Board and supervisor of the state district courts permits him to override through separate counsel the Attorney General's legal authority, LULAC App. 9a-17a; (ii) the two individual-capacity judge intervenors had standing as incumbents and voters to continue prosecuting the appeal despite the settlement proposal;[2] LULAC App. 18a-21a, and (iii) district court consideration of the settlement proposal would be improper because, given the Fifth Circuit's ruling on the merits of the section 2 claim, no colorable claim could any longer be made that the settlement was against the backdrop of a possible legal violation, LULAC App. 21a-25a. It therefore denied the remand motion and reached the merits of the voting rights claims.

On the merits, the Fifth Circuit found legal fault with the district court's failure to take into account partisan voting patterns, its choice of which election contests between which minorities and whites to take into account, its failure to evaluate sufficient numbers of election contests, its failure to consider the effects of the eligible pool of lawyers on the degree of minority presence on the bench, its reliance on untraced societal effects of historical discrimination, and its failure to accord the appropriate legal weight to the state's interest in the linkage of the primary jurisdictional base to the electoral base for district judges. In reversing the district court's legal determination as to each of the targeted counties, the Fifth Circuit measured each county against

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[2] The opinion does not explain whether it views these two individuals' standing to extend beyond the two counties -- Dallas and Harris -- where they reside and serve to the other seven targeted counties. The standing principle of *Baker v. Carr*, 369 U.S. 186 , 204-08 (1962), limits their standing to their individual counties. They do not serve, or vote in the challenged judicial races, in any of the other counties.

varying combinations of the catalogued district court shortcomings and concluded that none of the judicial districts in any of the counties violated the effects prong of the amended section 2 of the Voting Rights Act. LULAC App. 28a-121a.

Four members of the court dissented from both the remand denial and the merits reversal in eight of the targeted counties. LULAC App. 130a-134a (Op. by Chief Judge Politz); 135a-202a (Op. by Judge King); 202a (Op. by Judge Wiener).

ARGUMENT

The important issue of when a state may enter into a proposed settlement of a voting rights case should be resolved by the Court, thereby making it unnecessary to reach difficult issues on the standards for deciding judicial election challenges under section 2 of the Voting Rights Act.

Three of the four questions presented by LULAC ask the Court to determine the standards applicable to challenges to state judicial election systems under the effects prong of amended section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.[3] If answered, one of the questions -- the third one set out in LULAC's certiorari petition -- would postpone any need to consider fundamental and difficult issues of liability under section 2 in judicial election challenges. The Court should avail itself of that opportunity by granting certiorari limited to Question 3 presented by LULAC.

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[3] The fourth question, about whether the Fifth Circuit should have remanded the case to the district court following remand from this Court, is included in this categorization deliberately. It really is asking the Court to decide how section 2 standards are to be applied and implemented in the federal judicial system.

The state is filing simultaneously with this memorandum a cross-petition for writ of certiorari in *Attorney General of Texas v. Entz*, No. _____. The state's cross-petition presents only the settlement question for review and asks that the Fifth Circuit be reversed for its failure to grant the joint motion to remand. The state elaborates there on its reasons for asking that the writ be granted.

Issues about the proper standards for measuring section 2 violations undoubtedly are as important as they are complex. Critical issues of federalism are at stake and are under current consideration elsewhere in the federal system. The Eleventh Circuit now has under consideration a petition for rehearing en banc in the Florida judicial election case of *Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1993), in which a panel (with different facts and without acknowledging the Fifth Circuit's en banc opinion in this case) found a violation of section 2. A panel of the same circuit recently has taken under submission a section 2 judicial selection case from Alabama, *Southern Christian Leadership Conference v. Evans*, No. 92-6257.

The state's view, however, is that issues of settlement in the voting rights context are more appropriate to take up now because they go to the remedy phase of these types of cases. Remedy lies in the foreground in every section 2 dispute, especially when judicial election systems are under challenge. In fact, the very first factor under the leading section 2 case, *Thornburg v. Gingles*, 478 U.S. 30 (1986), turns on the question of whether a meaningful remedy is possible. Thus, the state argues here that the Court should look to first things first, and in this case, the first thing is the settlement issue presented by LULAC.

CONCLUSION

The Court should grant LULAC's petition for writ of certiorari limited to Question 3.

Respectfully submitted,

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Attorney General

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Attorney General of Texas

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Deputy
Attorney General

RENEA HICKS*
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November 24, 1993

Attorneys for State Respondents

APPENDIX

FILED
NOV 14 1989
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LULAC COUNCIL #4434, ET AL.,	§	
	§	Civil Action No.
	§	
vs.	§	MO-88-CA-154
	§	
JIM MATTOX, ET AL.	§	

ORDER

Came on for consideration, Dallas County plaintiff/intervenors' Motion to Correct Clerical Mistake, and after having reviewed the pleadings, it is the opinion of this Court that said Motion is well taken and it is therefore,

ORDERED, ADJUDGED and DECREED that:

1. Dallas County plaintiff/intervenors shall be noted in the style together with other plaintiff and defendant intervenors; and

2. at the conclusion of the paragraph numbered "3." that the following description of Dallas County plaintiff/intervenors shall be inserted: "plaintiff/intervenors from Dallas County, Jesse Oliver, Joan Winn White and Fred Tinsley, are black attorneys and citizens of Dallas County, Texas, each of whom is a former district judge from Dallas County, who was defeated in a county-wide election for district judges."

SIGNED this the 14th day of November, 1989.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

FILED
NOV 27 1989
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED	§	
LATIN AMERICAN	§	
CITIZENS (LULAC),	§	
COUNCIL #4434,	§	
et al.	§	
Plaintiffs,	§	
AND	§	
HOUSTON LAWYERS	§	
ASSOCIATION	§	
et al.	§	
Plaintiff-Intervenors	§	
	§	
V.	§	MO-88-CA-154
	§	
JIM MATTOX, et al.,	§	
State Defendants	§	
AND JUDGE	§	
SHAROLYN WOOD	§	
AND JUDGE F. HAROLD	§	
ENTZ	§	

ORDER

BEFORE THIS COURT is the State Defendants' Motion to alter or Amend this Court's Memorandum Opinion and Order of November 8, 1989 in the above-captioned cause. After this Court's Order was signed and entered, it was brought to the attention of the Court that

there were some clerical errors and omissions in this Court's Order. This Court is of the opinion that the State Defendants' Motion should be granted in part and denied in part. Accordingly,

IT IS ORDERED that this Court's previous Memorandum Opinion and Order be amended in part.

IT IS FURTHER ORDERED that the items telephonically communicated to this Court by Plaintiffs' Counsel be amended as follows:

1. The top of page 13 just before Finding of Fact number four be amended to reflect the following:

Plaintiff-Intervenors from Dallas County include Joan Winn White, Fred Tinsley and Jesse Oliver.

2. The last line of the second paragraph of Finding of Fact number eight on page 17 is amended to read, "... greater than fifty percent (50%) Hispanic voting age population were possible."

3. The second sentence of the first full paragraph on page 21 is amended to read, "Minority residents are concentrated largely in the Northeastern, East Central and Southeastern sections of Midland County."

4. Conclusion of Law number 16, as continued at the top of page 90, line one, is amended to include "Hispanic" after "Black" and the appropriate comma.

IT IS FURTHER ORDERED that items 1-3, 6 & 11 of the State Defendants' Motion are hereby GRANTED.

IT IS FURTHER ORDERED in connection with item 5 of the State Defendants' Motion that Finding of Fact 20.a. on page 49 is amended as follows:

Dr. Brischetto analyzed three (3) 1988 countywide judicial elections in Travis County. All three elections analyzed were County Court at Law Primary Elections.

IT IS FURTHER ORDERED that in connection with item 9 State Defendants' request is GRANTED IN PART to reflect that it was the 1986 Democratic Primary that was being discussed, rather than the Runoff Election. Item 9 is DENIED in all other respects.

IT IS FURTHER ORDERED that items 4, 7, 8 & 10 of

the State Defendants' Motion are hereby DENIED.

IT IS FURTHER ORDERED that this Court's Memorandum opinion and Order remains unchanged in all other respects.

SIGNED AND ENTERED this the 27th day of November, 1989.

/s/
LUCIUS D. BUNTON
CHIEF JUDGE

FILED
DEC 26 1989
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

LULAC COUNCIL #4434, et al.,	§	
Plaintiffs,	§	
	§	Civil Action No.
vs.	§	MO-88-CA-154
	§	
JIM MATTOX, et al.	§	
Defendants.	§	

ORDER

On this day came before the Court the State Defendants' Rule 60 (a) Motion to Correct Clerical Mistake. The motion is GRANTED. The last sentence of the last full paragraph on the second page of the Court's Order of November 27, 1989, is corrected to read as follows: "All three elections analyzed were 1988 Democratic Primary elections, two of which were for county court at law positions and one of which was for a district court position."

SIGNED and ENTERED this 26th day of December, 1989.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

FILED
DEC 28 1989
CHARLES W. VAGNER, Clerk
BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LULAC, et al.,	§	
Plaintiffs,	§	
	§	
vs.	§	NO. MO-88-CA-154
	§	
MATTOX, et al.	§	
Defendants.	§	

ORDER TO CORRECT CLERICAL ERRORS

1. In accordance with F.R.Civ.P. 60, the Court makes the following corrections of clerical mistakes in its Memorandum Opinion and Order of November 8, 1989:

2. On page 12, the following sentence is added to Paragraph 2: "Jesse Oliver, a Black from Dallas, testified that he is a member of LULAC."

3. On page 18, the following sentence is added to the end of the second complete paragraph of Paragraph 9: "This remains true when Plaintiffs controlled for voting age population of non-United States citizen of Spanish origin."

Done this 28th day of December, 1989, at Midland, Texas.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

FILED
JAN 2 1990
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED	§	
LATIN AMERICAN	§	
CITIZENS (LULAC),	§	
COUNCIL #4434,	§	
et al.	§	
Plaintiffs,	§	
AND	§	
HOUSTON LAWYERS	§	
ASSOCIATION	§	
et al.	§	
Plaintiff-Intervenors	§	
	§	
V.	§	MO-88-CA-154
	§	
JIM MATTOX, et al.,	§	
State Defendants	§	
AND JUDGE	§	
SHAROLYN WOOD	§	
AND JUDGE F. HAROLD	§	
ENTZ	§	

ORDER

BEFORE THIS COURT are the parties with their respective Proposed Interim Plans, Motions to Certify this Court's Memorandum Opinion and Order, of November 8, 1989, for Interlocutory Appeal, and Motion of Bexar County District Judges to Intervene in the above captioned cause.

This case is reminiscent of several lines of a recent song, I'm for Love, by Hank Williams, Jr. The lyric goes,

"The city is against the county,
The county is against the state,
The state is against the government,
and
The highway still ain't paved."

In this case the Governor has been against the Attorney General, the Attorney General against the Legislature, the Judges against this Court, and the system is still flawed. This is a regrettable situation, but it can't be helped. The Hank Williams song goes on to say "But I'm for love, and I'm for happiness."

This case was filed on July 11, 1988 and originally set for trial on February 13, 1989. The Court was persuaded, at least on one occasion, to continue the trial to give the Texas Legislature a chance to address the issue during its Regular Session. This Court continued the above captioned cause to April 17, 1989 to await the United States Supreme Court's disposition of the Petition for Writ of Certiorari in the case of Roemer v. Chisom. The Court again continued the case to July 11, 1989, based on oral Motions to Continue made on the record during a hearing on Motions to Intervene held by this Court on February 27, 1989. The Court continued the trial to September 18, 1989, because of a conflict of settings with one of the attorneys. At the conclusion of the trial in September, the Court was requested to hand down its opinion prior to the convening of the Texas Legislature in Special Session so that a violation (if one was indeed found) could be looked at and perhaps remedied during the Special Session.

This Court specifically reserved ruling upon Plaintiffs' Motion for an order enjoining further use of the at-large election scheme in the affected counties until the State Legislature had an opportunity to offer a remedial plan. The Legislature went into Special Session on November 13, 1989, some five days after entry of this Court's November 8, 1989 Order. Governor Clements

deemed it advisable not to submit the question of judicial redistricting to the Special Session. The Governor did, however, request that he and this Court meet and discuss the matter. The meeting was held, and attorneys for both Plaintiffs and Defendants were present. The Governor advised the Court that no remedy would be forthcoming until some time after the March 13, 1990 Primary Elections. The Governor requested that the matter be delayed until the Regular Session of the Legislature in January 1991. He further advised the Court that, if this was not satisfactory, he would call a Special Session some time in April or May of 1990 and request the Legislature to study and take whatever action might be necessary to remedy the situation.

The timing is perhaps unfortunate. There will be a census taken in 1990, which may reflect some changes in population in the nine counties involved. Our Legislature meets in Regular Session only in odd years and inevitably somewhere down the line the method of selection or election of State District Judges will have to be submitted to the voters of Texas. The Court is of the opinion that a delay until after the Primary Elections are held in 1990 and a delay until after a Special Session of the Legislature is held in late spring of 1990 and a further delay of implementation of any solution by the Legislature would not be in the interest of justice, would further dilute the rights of minority voters in the target counties in question, and would be inequitable and work an even greater hardship on the judges and courts involved.

Because the Legislature took no action on the matter in Special Session in November and December, 1989, and the refusal of the Supreme Court to grant a writ in Chisom v. Roemer, 853 F.2d 1186, 1192 (5th Cir. 1988), and the statements of the Governor of the State of Texas, and the imminence of the Primary Elections in 1990, the Court is not inclined to defer action. See Wise v. Lipscomb, 437 U.S. 535 (1978). Under these circumstances, this Court is of the opinion that it may fashion an interim plan that the law,

equity and justice require. Chisom, supra, at 1192. On December 12, 1989, or shortly thereafter, all parties were advised to file any Proposed Plans and objections with the Court by December 22, 1989. An Agreed Settlement was entered into by and between the Plaintiffs and Defendants in this matter, but was not approved by some of the Intervenors.

The Court should point out that the State Legislature will have still a third opportunity to propose a permanent remedy consistent with this Court's November 8, 1989 Order should it convene, and should it pass legislation in April or May of 1990.

The plan which follows is strictly an interim plan for the 1990 elections affecting 115 State District Court judicial seats in the nine counties in action. Upon consideration of the Motions, Responses, Objections, letters, exhibits, attachments and arguments of the parties, the Court is of the opinion that the following Orders are appropriate. Accordingly,

IT IS ORDERED that the Joint Motion of Plaintiffs, Plaintiff-Intervenors and the Attorney General of Texas for Entry of a Proposed Interim Plan is hereby GRANTED IN PART and DENIED IN PART in the following respects:

1. All Defendants and those acting in concert are hereby enjoined from calling, holding, supervising and certifying elections for State District Court Judges in Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland Counties under the current at-large scheme.

2. For the 1990 elections, according to the Secretary of State of Texas, one hundred fifteen (115) District Court elections are scheduled in the counties affected by this Court's Order. The following number of District Courts are up for election by respective county: Harris (36); Dallas (32); Tarrant (14); Bexar (13); Travis (6); Jefferson (6); Lubbock (3); Ector (3); and Midland (2).

Under this Interim Plan, District Court Elections in Harris, Dallas, Tarrant and Bexar Counties shall be

selected from existing State Legislative House District lines as indicated in Attachment A. District Court Elections in Travis County shall be from existing Justice of the Peace Precinct Lines. See Attachment A. District Court Elections in Jefferson, Lubbock, Ector and Midland Counties shall be according to existing County Commissioner Precinct Lines. Id. Each county shall be designated by a District Number, and each election unit by subdistrict number.

3. Each candidate shall run within a designated subdistrict and be elected by the voters in the subdistrict. Consistent with the Texas Constitution, each candidate must be a resident of his or her designated judicial district (which is countywide), but need not be a resident of the election subdistrict.

4. Elections shall be non-partisan. Each candidate shall select the election subdistrict in which he or she will run by designated place. Candidates in Dallas, Tarrant, Bexar, Ector and Midland Counties shall file an application for a place on the election ballot with the County Elections Administrator. Tex. Elec. Code Ann. §31.031 et seq. (Vernon 1986). Candidates in Harris, Travis, Jefferson and Lubbock Counties shall file such an application with the County Clerk of those counties or the County Tax Assessor-Collector, depending on the practice of that particular county. Tex. Elec. Code Ann. §§ 31.1031 et seq., 31.091 (Vernon 1986).

5. All terms of office under this Interim Plan shall be for four (4) years. Tex. Const. Art. V. §7 (1976, amended 1985). This Court is of the opinion that a two-year term is unfair to both those beginning and those ending their judicial careers.

6. Elections shall take place the first Saturday of May, 1990, with Run-off Elections to take place the first Saturday of June, 1990. Tex. Elec. Code Ann. §41.001(b)(5) (Vernon Supp. 1989).

7. An application for a place on the non-partisan election ballot must be filed not later than 6:00 p.m. on March 26, 1990. Except as modified herein, all provisions

of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

8. In 1991, the Administrative Judge of the countywide district shall designate:

(1) Any courts of specialization in terms of docket preference; and

(2) The District Court numbers in use prior to the Interim Plan's adoption. Successful incumbents shall have preference in such designation.

9. Current jurisdiction and venue of the District Courts remain unaffected, subject to modification by rule of the Supreme Court of Texas.

10. There shall be no right of recusal of judges elected under this plan. This Court is of the view that such a measure would be extremely disruptive to District Court dockets, administratively costly and could be the source of abuse by attorneys attempting to gain continuances of their cases.

IT IS FURTHER ORDERED that the above Interim Plan applies only to the 1990 State District Court Judicial Elections in the nine target counties at issue in this case. If the Texas Legislature fails to fashion a permanent remedy by way of a Special Called Session in the spring of 1990, then this Court will put into effect a Permanent Plan for the election of State District Court Judges in the nine target counties in question.

IT IS FURTHER ORDERED that the Motions of Defendant-Intervenor JUDGE SHAROLYN WOOD, Defendant-Intervenor JUDGE HAROLD ENTZ and the State Defendants to Certify this Court's Memorandum Opinion and Order of November 8, 1989 as modified for clerical corrections on November 27, 1989 and December 26, 1989 for Interlocutory Appeal pursuant to 28 U.S.C. §1292(b) is hereby GRANTED IN PART.

IT IS FURTHER ORDERED that to the extent that such Motions request a stay of further proceedings in the above captioned cause such Motions are hereby DENIED.

IT IS FURTHER ORDERED that the Motion of Bexar County Judges TOM RICKOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE AND MICHAEL P. PEDEN to Intervene as Defendants in the above captioned cause is hereby DENIED.

This Court, of course, has granted the right for an Interlocutory Appeal. The request to stay proceedings pending the appeal is DENIED, because the Court does not feel that District Judges should be continued in office for an indefinite period of time. The right of the electorate to select judges in the year 1990 should not be denied unless, of course, interim action is taken by the Texas Legislature which changes the method of the selection and election of judges. The pressing need for the administration of justice in our state courts is recognized. It is the opinion of this Court that the plan set forth herein is the least disruptive that can be effected at this juncture. To allow Primary Elections in 1990 to be held in the same manner as they were in 1988 would be contra to the dictates of Fifth Circuit law and the Congressional Mandate of the Voting Rights Acts. Recognition that the November 8, 1989 Judgment has far-reaching effects is the reason for the allowance of an expedited appeal, and again the Court would encourage the Governor to call a Special Session to address the matter and, further, would request that the State Legislature remedy the current situation, as the Court is firmly of the opinion that any remedy other than this interim remedy should be done by duly elected legislators.

SIGNED and ENTERED this 2nd day of January, 1990.

/s/_____
LUCIUS D. BUNTON
CHIEF JUDGE

FILED
JAN 11 1990
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), et al.	§	
V.	§	MO-88-CA-154
JIM MATTOX, Attorney General of the State of Texas, et al.	§	

ORDER

BEFORE THIS COURT is the Motion of Attorney General Jim Mattox on behalf of the State of Texas to Alter this Court's Order of January 2, 1990; the Response thereto of Harris County District Judge Sharolyn Wood; and the Response thereto of Plaintiffs LULAC et al., Plaintiff-Intervenors Jesse Oliver, et al., and Plaintiff-Intervenors Houston Lawyers Association et al. Having considered said Motion and Responses, the Court is of the opinion that said Motion should be denied.

The Court is further of the opinion that other changes to certain terms of the injunction contained in that January 2, 1990 Order are proper. Specifically, the Court herein modifies the Order for the limited purpose of delaying the elections ordered pursuant to its Order, and

removing the expedited rights of appeal previously granted in this matter.

The Court believes that delaying judicial elections pursuant to its Order of January 2, 1990 is desirable for several reasons. First, the Court notes that Governor Bill Clements recently called a special session of February 27, 1990, to deal specifically with Texas' system of selecting judges. In the interests of comity and Federalism, legislatively directed remedial measures are preferable to measures ordered by this Court. Delaying the judicial elections ordered by this Court will serve these interests by giving the Legislature additional time. Second, judicial elections will still take place in 1990 under the modified Order, thus minimizing disruption of the Texas judiciary. Third, delaying court-ordered judicial elections will provide additional time for the United States Department of Justice to consider any remedy adopted by the Legislature before such elections occur. Fourth, delaying these elections will remove the need for expedited appeal to the Fifth Circuit by providing additional time for that Court to consider and rule upon this Court's Order before court-ordered judicial elections occur.

The Court urges the Legislature to consider in its deliberations a quotation from President Harry S. Truman, who said, "[w]e must build a better world, a far better world--one in which the eternal dignity of man is respected."

I. The Attorney General's Motion is Properly Asserted Pursuant to Rule 59(e), Fed. R. Civ. P., and This Court Retains Jurisdiction to Modify Its Order of January 2, 1990.

The Defendant-Intervenor Judge Wood of Harris County appears to question the effect of the Attorney General's Motion on the notices of appeal filed in this case by herself and Judge Entz, and the powers of this Court to modify the terms of the injunction contained in its Order of January 2, 1990. There is no serious dispute before the

Court that the parties to this case have the right under 28 U.S.C. Section 1292(a)(1) to appeal this Court's Order of January 2, 1990. If that Order were a judgment as to which the Attorney General's Motion is properly asserted under Rule 59(e), then the Parties' notices of appeal are ineffective, the Court retains jurisdiction to modify the judgment, and the deadlines for appeal are extended according to Fed. R. App. P. 4(b)(4). The Court believes that Order is such a judgment, and that this is the correct analysis.

A "judgment" for purposes of Rule 59(e), which provides for the amendment of a judgment and the postponement of the time for filing an appeal, is defined in Rule 54(a). See Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE Section 2651 and cases cited therein. Rule 54(a) defines judgment as an "appealable order." 28 U.S.C. Section 1292(b) undisputedly makes this Court's Order of January 2, 1990 appealable of right. Therefore a motion to alter or amend the judgment is properly asserted under Rule 59(e).

The Attorney General's Motion would properly be brought under Rule 62(c), if jurisdiction of the case were already lodged in the court of appeals, for example where a Rule 59(e) motion was not timely made and appeal was taken, or a Rule 59(e) motion was made and ruled upon, and appeal subsequently taken.

The Court assumes for the purposes of this Motion that there exist other circumstances that would make a Rule 59(e) Motion improper here, although the Court takes pains to note that the parties have not cited the Court to such circumstances, and the Court in examining its jurisdiction has so far found none. In that event, Judge Wood contends, the Attorney General's Motion is one properly asserted under Rule 62(c), under which Rule this Court's modification power are curtailed.

The Court also assumes that its sua sponte alteration of a judgment, that is independent of and goes beyond the alteration requested by a party under Rule

59(e), might be reviewed under the standard of Rule 62(c). The problem is that the timely filing of a Rule 59(e) motion, which the Court believes has been done here, suspends the appeal process and renders Rule 62(c) technically inapplicable because the case is not on appeal. Absent appeal, a district court has complete power over its interlocutory orders. Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2nd Cir. 1962).

It is important to note that this Court has consistently voiced its preference for the Texas authorities devising a plan for judicial elections consistent with the Voting Rights Act, with reasonable dispatch, and therefore has considered and styled its January 2, 1990 injunction as an interim plan. The Order is, of course, binding and effective if, and to the extent, the Legislature fails to act. If the Legislature devises an acceptable plan under the Voting Rights Act this lawsuit, and the Court's injunction along with it, would likely become moot. Of course, an argument could be made that this Court's interim plan of redistricting, because conditional in this sense, is not a judgment at all until the contingency has been removed, and therefore is not even appealable. In any event, this Court's overall plan of encouraging legislative redistricting is, the Court believes, relevant to considering, under the law of Rule 62(c), what constitutes a modification of an injunction "in aid of appeal."

In sum, the Federal Rules of Civil Procedure do not seem to provide a neat category for classifying motions on equitable remedies such as the one at issue. This Court is of the opinion that the Attorney General's Motion is one properly brought under Rule 59(e) because this Court's Order of January 2, 1990 is a "judgment" within the meaning of Rule 54(a). However, in the event this characterization is error, as Judge Wood seems to contend it is, the Court believes it proper to apply the more restrictive analysis under Fed. R. Civ. P. Rule 62(b) as set out in cases cited by the parties.

II. Alternatively, This Court Possesses Jurisdiction to Make Modifications to Its January 2, 1990 Order as Ordered Herein Pursuant to Rule 62(b), Fed. R. Civ. P.

Judge Wood challenges this Court's jurisdiction to entertain a motion to modify its January 2, 1990 Order, and presumably as well the Court's jurisdiction to modify said Order sua sponte. However, despite Judge Wood's artful choice of quotations from pertinent case law, the Court is not persuaded that it lacks jurisdiction to make certain changes in its Order even if the injunction contained therein is properly on appeal.

Once appeal is taken from an interlocutory judgment (as the Court assumes for discussion purposes that is has been here), Fed. R. Civ. P. 62(c) provides that "the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal. . . ." The scope of this Court's power under Rule 62(c) has most recently been the subject of analysis by the Fifth Circuit in Coastal Corp. v. Texas Eastern Corp., 869 F.2d 817 (5th Cir. 1989). Under the holding in Coastal, this Court is definitely constrained insofar it lacks authority to dissolve the injunction on appeal. Id. at 821. But regarding less radical modifications, the Court is directed to limit the exercise of its power to "maintaining the status quo." Id. at 820.

Judge Wood would have the Court interpret "maintaining the status quo" to mean that this court may do nothing except "in aid of the appeal." Willie v. Continental Oil Co., 746 F.2d 1041 (5th Cir. 1984). The Fifth Circuit applied this directive in Willie to divest the District Court of jurisdiction to modify a judgment under Rule 60(b) because of inadvertence or excusable neglect, where substantive rights of the parties were at stake. Id. at 1045. In Willie, the parties sought to have the District Court correct its judgment to incorporate a mistakenly-omitted stipulation regarding the percentage of liability to be borne by one of the defendants. The District Court was

empowered to deny such a motion because denial would be "in furtherance of the appeal". But had the District Court wished to grant the Rule 60(b) motion, leave of the Court of Appeals would have been required. Id. at 1046.

In the Coastal case, however, the Fifth Circuit seemed to impose a different standard of "maintaining the status quo," and defining that standard to mean that a district court may not take action, such as vacating an injunction, that would presumably divest the court of appeals from jurisdiction while the issue is on appeal. Coastal, supra, at 820. Cases cited in the Coastal opinion consistently deal with granting or staying injunctions during the pendency of appeal. Id. Consistent with the analysis expressed in the Attorney General's brief, this Court interprets Coastal to say that it may not vacate the injunction now in issue while it is on appeal. No such action is contemplated.

Even if the "in aid of appeal" standard set out in Willie should guide the Court, it would seem that the modifications now ordered, which primarily give the Legislature additional time to consider redistricting, does not violate that standard.

Accordingly, this Court's Order of January 2, 1990 will be amended.

IT IS ORDERED that this Court's Order of January 2, 1990 be, and is hereby amended pursuant to the following directive only.

Item number "6" at pages 6 and 7 is amended to read as follows:

> 6. Elections shall take place on November 6, 1990 with runoff elections, if and where necessary, on December 4, 1990.

Item numbered "7" at page 7 is amended to read as follows:

> 7. An application for a place on the non-partisan election ballot must be filed not later than

6:00 p.m. on September 19, 1990. Except as modified herein, all provisions of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

IT IS FURTHER ORDERED that any rights of expedited appeal granted in this matter be, and are hereby RESCINDED.

SIGNED AND ENTERED this 11th day of January, 1990.

/s/
LUCIUS D. BUNTON
CHIEF JUDGE

Supreme Court, U.S.
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No. 93-630

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
PETITIONERS,

v.

ATTORNEY GENERAL OF TEXAS and
JUDGE F. HAROLD ENTZ, *et al.*,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGE ENTZ'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly construed the Voting Rights Act to require proof that the candidate preferred by minority voters was defeated on account of race?

2. Whether the Court of Appeals properly considered the powerful interest of the State of Texas in the establishment and operation of a fair and effective judicial system in determining whether the Voting Rights Act was violated?

3. Whether the Court of Appeals properly refused to permit some of the parties, by their agreement, to prevent consideration of the merits of the appeals independently perfected by Judge Entz and Judge Wood?

4. Whether the 1982 amendments to the Voting Rights Act are unconstitutional if not construed as the Court of Appeals did?

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No. 93-630

In the

Supreme Court of the United States

October Term, 1993

League of United Latin American Citizens, *et al.*,

Petitioners,

v.

Attorney General of Texas and
Judge F. Harold Entz, *et al.*,

Respondents.

JUDGE ENTZ'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Dallas County District Judge F. Harold Entz ("Judge Entz") opposes Petitioners' Petition for a Writ of Certiorari, for the following reasons:

STATUTES INVOLVED

In addition to the statutes cited by Petitioners, this case involves several constitutional provisions, as follows:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. U.S. CONST. art. IV, § 2.

The United States shall guarantee to every State in this Union a Republican Form of Government . . . . U.S. CONST. art. IV, § 4.

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . . U.S. CONST. amend. V.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. U.S. CONST. amend. VI.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. CONST. amend. X.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

. . . .

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. U.S. CONST. amend. XIV, §§ 1, 5.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV, §§ 1, 2.

STATEMENT UNDER RULE 29.4(b)

Because the proceeding draws into question the constitutionality of the 1982 amendments to Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

The Court of Appeals below has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question, by letter dated February 20, 1990.

STATEMENT OF THE CASE

A Voting Rights Act claim requires "a searching practical evaluation of the 'past and present reality.'" S.

Rep. No. 97-417, at 30 (quoting *White v. Regester*, 412 U.S. 772, 769, 770 (1973)), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 208, and "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quoting *Rodgers v. Lodge*, 458 U.S. 613 (1982)). Petitioners' Statement of the Case deficiently ignores the reality of partisan politics, which has permeated every aspect of this case ranging from the underlying elections to the attempts of two of Texas' elected Attorneys General (both Democrats) to surrender to Petitioners' demands through collusive "settlement" efforts. Judge Entz agrees generally with the statement of the case in the Fifth Circuit's en banc majority opinion below and will touch briefly on the facts in this Opposition only to illustrate some of the partisan political aspects of the case omitted by Petitioners.

Texas district judges are elected in partisan elections. App. 3a. From Reconstruction until about 1978, this meant essentially all Texas district judges were Democrats. In recent years that has changed. Beginning in 1978 in Dallas County, for example, virtually only Republicans have been elected as district judge. *E.g.*, App. 89a. This partisan sea change has happened to greater and lesser degrees in most of the urban counties in the state. *See generally* App. 86a-120a.

The partisan shift is color blind. Again using Dallas County as an example, a black, female, Republican challenger defeated a white, male, Democrat incumbent. App. 89a-90a. In every instance save one, when a minority

candidate ran for district judge, the Republican candidate won regardless of race. App. 89a. The only exception is the most recent election (after trial) when a black Democrat beat a white Republican. The color blindness of the electorate also holds true within both parties; minority candidates of both parties fare as well as or better than white candidates of their respective parties. App. 91a, 94a. The practical reality of Dallas County judicial races is that partisan affiliation determines election outcomes and race is irrelevant. App. 88a, 93a.

The emergence of the Republican party as a viable second party in Texas has manifested itself, such as in this suit; Governor Clements, his appointed Secretary of State Bayoud, and Chief Justice Phillips of the Texas Supreme Court, all Republicans and defendants, were by statute represented by Attorney General Mattox, a Democrat. *E.g.*, App. 4a-5a & n.4. In view of the partisan nature of the claims in this case and the partisan affiliation of the state's lawyer, Judge Entz intervened in his various individual capacities: a sitting judge whose election was under attack, a lawyer and participant in the judicial system, and a registered voter in Dallas County. App. 20a. Judge Wood from Harris County similarly intervened. *Id.* As the Fifth Circuit acknowledged, Judge Entz and Judge Wood "played an important role at trial and have since taken the lead." App. 19a.

Following the adverse ruling on liability in the trial court, Attorney General Mattox attempted to side with Petitioners and proposed a remedial plan acquiescing in Petitioners' demands to end countywide elections, over the

objections of Judge Entz and Judge Wood. When the district court adopted an interim plan that differed slightly from the Attorney General's and Petitioners' only in eliminating the partisan nature of elections, it was Judge Entz and Judge Wood who perfected the first appeal from that order and sought a stay. App. 5a. It was only later that the Attorney General, dissatisfied with the nonpartisan aspect of the interim plan, appealed and sought a stay. *Id.*

The Attorney General's lukewarm defense of this case continued with his successor, Attorney General Morales (a Democrat). Following decisions for defendants from the Fifth Circuit and the Fifth Circuit en banc, counsel for the Attorney General stood before this Court and argued that the Fifth Circuit was wrong, and counsel for Judge Entz and Judge Wood were unable to argue in favor of the ruling below. On remand and following an adverse panel decision that was quickly vacated when the case was set for rehearing en banc, the Attorney General once again attempted to accede to Petitioners' demands and thereby snatch defeat from the jaws of victory. App. 7a.

Efforts to resolve this case through the political process had previously failed; changing Texas' system of electing judges would require a constitutional amendment, and no amendment acceptable to Petitioners could muster the requisite 2/3 vote. App. 7a. Thus, in the purported settlement, Petitioners, the Attorney General, and other statewide elected officials (all Democrats) sought to enlist the power of the federal courts to permit them to sidestep the to-them awkward requirements of the Texas Constitution and simply impose their constitutional

amendment on the state by judicial fiat effectuating their collusive agreement. *Id.*

In an effort to obtain political legitimacy for their purported settlement, the Attorney General and Petitioners agreed that it would be effective only upon approval by both houses of the Texas Legislature. App. 7a-8a. For reasons likely not of interest to this Court, one third of the Texas Senate can block a vote on any subject. Thus, for the same reasons no constitutional amendment on this subject can be enacted, the Texas Senate never approved the purported settlement. App. 8a. This procedural obstacle did not slow down those intent on amending the Texas Constitution by a collusion-tainted judicial decree — they accepted an endorsement by a majority of the state senators sitting as a committee in a vote that divided precisely along party lines. *Id.*

Judge Entz relies upon the opinion of the en banc majority of the Fifth Circuit for the balance of the factual background.

REASONS FOR DENYING THE WRIT

I. THE ISSUES NOW RIPE FOR REVIEW DO NOT MERIT THIS COURT'S ATTENTION

Partisan politics is not an evil of itself. A partisan political brawl becomes destructive when it masquerades in the guise of civil rights litigation. Petitioners would have this Court rewrite Clausewitz to provide that Voting Rights Act litigation is a continuation of partisan politics by other means.

The subject matter of this case — the structure of the judiciary of one of our sovereign states — is certainly significant. That fact alone, however, does not mean that the decision below, in the context of the developing jurisprudence under the Voting Rights Act, merits review by this Court at this time. This Court's opinion in *Houston Lawyers' Association v. Attorney General of Texas*, 115 L. Ed. 2d 379 (1991) ("*HLA*"), raised a new and significant question regarding how a state's vital and affirmative interest in the structure of one of its branches of government would be considered in determining whether section 2 of the Voting Rights Act is violated. The Fifth Circuit is the only circuit to date to consider that question after *HLA*; although Petitioners do not acknowledge it, even the dissenting judges below who reached the merits agreed that the weight of the state's interest is a legal question that can be considered de novo by an appellate court. App. at 173a-180a, 280a & n.30. The opinion below also addressed the issue of whether the race of the candidate matters in determining the presence or absence of racially polarized voting. Again, the Fifth Circuit is the only circuit to date to consider that question after *HLA*. This Court has determined in similar instances that it would wait to address issues until other lower courts had considered them. *E.g.*, *McCray v. New York*, 461 U.S. 961 (1983).

The purported conflicts between the Fifth Circuit's ruling and the Eleventh Circuit's later ruling in *Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1993) (reh. pending as of Nov. 23, 1993), also do not merit review. The issue of whether the degree of minority success should be compared

to the pool of qualified candidates or to the populace as a whole is barely present in a footnote in *Nipper*. *Id.* at 1181 n.13. The issue is likewise not central to the Fifth Circuit opinion and likely would not affect the outcome were it resolved differently. Similarly, the question of whether to consider elections with white versus Hispanic, rather than black, candidates was peripheral to the Fifth Circuit's opinion and, in view of the holding regarding the affirmative state interest, would not affect the outcome were it resolved differently, *see* App. 95a n.37; furthermore, that reasoning is not actually in conflict with *Nipper*, which addressed white versus white elections. Review of those issues, if ever merited, would better occur in a case in which they are central and outcome determinative.[1]

Finally, Petitioners claim that certiorari is justified because the Fifth Circuit did not follow this Court's rulings in *HLA* and *Thornburg v. Gingles*, and did not follow this Court's mandate in *HLA*. That claim is nothing more than an argument that the dissents below were correct and the majority was wrong. If the majority was correct, then it correctly understood and followed this Court's rulings and mandate, and certiorari is not needed. Judge Entz believes

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[1]Moreover, the purported conflict between the Eleventh and Fifth Circuits may soon disappear. *Nipper* was decided September 15, 1993; the Fifth Circuit's ruling below was on August 23, 1993. *Nipper* does not cite the Fifth Circuit's decision and presumably was drafted before the Fifth Circuit's ruling was released. As of November 23, 1993, a motion for rehearing was still pending in *Nipper*.

the Fifth Circuit's ruling can stand on its own merits without further argument from him at this point.

II. The Fifth Circuit Properly Construed Section 2 to Avoid Difficult Constitutional Issues that this Court May Be Required to Address If Certiorari Is Granted and a Different Construction of Section 2 Applied

As noted by the Fifth Circuit below, Judge Entz has carefully preserved serious constitutional challenges to section 2, including the constitutionality vel non of the 1982 amendments, which were not addressed due to the construction given section 2 below. App. 28a n.28. Those issues include:

- Whether application of section 2(b) to destroy the structure of Texas' judiciary violates fundamental principles of state sovereignty, federalism, and separation of powers?

- Whether the 1982 amendments to section 2 were a valid exercise of Congress' enforcement powers under the Fourteenth or Fifteenth Amendments?

- Whether section 2 is unconstitutionally vague if it grants essentially unreviewable discretion to the district courts to set aside decisions of the representative branches of government?

- Whether the construction of section 2 advocated by Petitioners and the dissenters below unconstitutionally dispenses with any causation element

and transforms section 2 into an affirmative action plan mandating particular election results?

It was certainly appropriate for the Fifth Circuit to adopt a reasonable construction of section 2 that avoided addressing these difficult constitutional questions. *E.g.*, *Crowell v. Benson*, 285 U.S. 22, 62 (1932). If certiorari is granted, this Court may also be required to consider those issues.

III. THE FIFTH CIRCUIT'S REFUSAL TO REMAND AND THEREBY DISMISS JUDGE ENTZ'S INDEPENDENTLY PERFECTED APPEAL WAS CORRECT AND WOULD NOT IN ANY EVENT MERIT THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS

Petitioners complain that the Fifth Circuit improperly reached the merits of Judge Entz's and Judge Wood's appeal because the State Defendants were ready to surrender. They bolster that argument by mischaracterizing Judge Entz's intervention as being solely to protect his job. As the Fifth Circuit noted, Judge Entz intervened not only as a sitting judge, but also as a lawyer and voter. App. 20a. Judge Entz's standing as a voter has been strengthened by this Court's recent decision in *Shaw v. Reno*, 113 S. Ct. 2816, (1993). The Fifth Circuit's opinion otherwise sufficiently addresses the reasons the Petitioners and the State Defendants cannot by *their* agreement dispose of *Judge Entz's* appeal.

Even were Petitioners correct on this point, Judge Entz respectfully suggests that disposition of this issue standing alone does not merit the Court's review. It surely will be a rare circumstance that a governmental defendant will prefer

to surrender rather than win; it will be rarer still that other persons have intervened as defendants and desire to continue the fight. This Court need not exercise its supervisory powers over the lower federal courts to address such a rare circumstance.

CONCLUSION

Judge Entz respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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Respondents.

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REPLY TO BRIEFS IN OPPOSITION AND SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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I.
THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED WITH REGARD TO ALL ISSUES

A. The Response of the Attorney General of Texas, et al.

The respondents representing the State of Texas agree that certiorari should be granted on the third question presented by the petition, viz., the propriety of the court of appeals' refusal to remand the case to the district court for a hearing on the proposed settlement of the case. This issue is also raised by the cross-petition for

certiorari filed by the State in No. 93-928. However, the State also suggests that certiorari not be granted on the other important issues raised.

We urge that, in the interest of judicial economy, all the issues should be accepted for review now.

First, one of the bases for the court of appeals' refusal to remand for a hearing on the settlement was its view with regard to the merits of the case. Thus, the question of the merits will have to be considered by this Court in resolving the settlement question.

Second, even if this Court holds that the decision of the court of appeals with regard to the settlement was incorrect, it should reach the issues we have raised with regard to the correctness of the lower court's decision on the merits to provide guidance to the courts below on remand.

Third, on the other hand, if this Court decides that the decision of the court of appeals with regard to the settlement was correct, the issues regarding the lower court's decision on the merits will be ripe for review. In light of the importance of those issues to the continuing vitality of the Voting Rights Act, they should be resolved by the Court.

Fourth, this case has been travelling between the district court, the court of appeals, and this Court without an authoritative decision on the merits of the issues raised. In the meantime, three elections have been held and another is imminent. A final decision clarifying the legal standards under which judicial elections are to be held in the State of Texas and elsewhere is, therefore, manifestly appropriate.

B. The Opposition of Judge Wood.

Judge Wood's arguments regarding the merits of the decision below are premature, and only emphasize the importance of granting certiorari. This case presents issues of substantial national importance regarding the efficacy of the Voting Rights Act that have, as yet, not been resolved by this Court. The parties have differing views as to whether the decision below complied with this Court's mandate and decision in *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. ___, 115 L.Ed.2d 379 (1991). There is also a dispute over whether the decision below, particularly insofar as it holds that racial bloc voting can be explained away by partisan voting patterns and that elections not involving races between minority and white candidates should be factored into a vote dilution analysis, is consistent with *Thornburg v. Gingles*, 478 U.S. 30 (1986).

These are legal issues of the utmost importance since their resolution will govern the enforcement of the Voting Rights Act nationwide. Thus, it is well-known that African American voters tend to vote for Democratic party candidates for all levels of public office, while voters of other ethnic origin tend to vote for Republican candidates. The decision below imposes on plaintiffs in voting rights cases the additional and onerous burden of proving that racial bias, and not partisan politics, accounts for the inability of minority voters to elect candidates of their choice where such a voting pattern exists. Whether this result is a departure from the standards set by this Court in *Gingles* is presented by the first question in our petition for certiorari and should be resolved by this Court.

Judge Wood's argument that there is no conflict between the Fifth and Eleventh Circuits is simply spurious. *Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1993) is

inconsistent with the decision below. *Nipper* governs decisions in the Eleventh Circuit and produces precisely the type of conflict with regard to an issue of great national importance that this Court sits to resolve.

C. The Opposition of Judge Entz.

The Brief in Opposition of Judge Entz consists largely of a dissertation on the impact of partisan politics on this litigation. Basically, Judge Entz is unhappy that the Democratic Party won elections to the offices that, under Texas law, have the authority to speak for the State of Texas in litigation. But the party affiliations of the current Attorney General, Governor, Lieutenant Governor, Secretary of State, majorities of the house of the State legislature, and the Chief Justice of the Texas Supreme Court are simply irrelevant to the issues presented by the petition herein.

The point is that the duly elected officials of the State of Texas have sought to exercise their authority to resolve this litigation through a settlement. Judge Entz's disappointment with being on the losing side in the elections that chose those officials does not provide a basis for disapproving that settlement or even an issue properly justiciable by a federal court.

II.

THE DECISION BELOW IS INCONSISTENT WITH THE DECISION OF THE THIRD CIRCUIT IN *JENKINS V. RED CLAY CONSOL. SCHOOL DISTRICT*

Subsequent to the filing of the petition for writ of certiorari in this case, the decision of the Third Circuit in *Jenkins v. Red Clay Consolidated School District Board of Education*, 4 F.3d 1103 (3rd Cir. 1993) was reported.[1] That decision discusses whether and to what extent elections involving white-on-white contests should be factored into a *Gingles* analysis when the underlying claim is that the vote of minority voters has been diluted. The Third Circuit resolved this important issue in a manner inconsistent with the approach taken below.

In *Jenkins* the Third Circuit held that "As a general matter, we believe that elections involving white candidates only are much less probative of racially polarized voting than elections involving both black and white candidates." 4 F.3d at 1128. Therefore, plaintiffs are not required to present evidence regarding such elections. Rather, the burden is on the defendants to present such evidence if they believe it rebuts plaintiffs' showing of cohesiveness or white bloc voting. *Id.* The Third Circuit went on to discuss a number of factors that the defendants must show before results of elections that do not involve black candidates can be used. *Id.* at 1129.[2]

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[1]A petition for a writ of certiorari is pending *sub nom. Red Clay Consolidated School District Board of Education v. Jenkins*, No. 93-812.

[2]The Third Circuit requires consideration of the following factors to determine whether a white candidate may properly be considered the black community's preferred candidate: (1) the extent which the minority community has sponsored the candidate; (2) the attention

The Fifth Circuit here, on the other hand, imposed no such limitations on the use of such evidence. Rather, it relied solely on the unsupported proposition that partisan (*i.e.*, Democrat v. Republican) voting patterns could explain away all evidence of racial bloc voting no matter what the race of the candidates. The use of such a proposition is inconsistent with the Third Circuit's requirement that defendants present evidence that candidates who are not of the minority group at issue were the candidates of choice of the minority community based on specific criteria.

Certiorari should be granted to resolve the differences between the Third, Fifth and Eleventh Circuits with regard to this important issue.

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which the candidate gave to the particular needs and interests of the minority community, including the extent to which the candidate campaigned in that community; (3) the rates at which black voters turned out in comparison to elections when a minority candidate sought office; and (4) the extent to which minority candidates have run and the ease or difficulty with which a minority candidate is able to run for office. 4 F.3d at 1129.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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